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Item 48 of the provisional agenda*
Culture of peace

Letter dated 13 August 2008 from the Chargé d'affaires a.i. of the Permanent Mission of Saudi Arabia to the United Nations addressed to the Secretary-General

I have the honour to forward the Declaration issued by the World Conference on Dialogue, which was convened by the Custodian of the Two Holy Mosques, Abdullah Bin Abdulaziz Al-Saud, in Madrid from 16 to 18 July 2008 (see annex). I would appreciate it if you would have the present letter and its annex circulated as a document of the General Assembly, under agenda item 48.

(*Signed*) Abdullatif H. **Sallam**
Counsellor
Chargé d'affaires a.i.

* A/63/150.

08-46802 (E) 280808

Annex to the letter dated 13 August 2008 from the Chargé d'affaires a.i. of the Permanent Mission of Saudi Arabia to the United Nations addressed to the Secretary-General

[Original: Arabic, English and French]

The Madrid Declaration

Issued by

The World Conference on Dialogue

Organized by

the Muslim World League

in Madrid, Spain

Under the Patronage of

Custodian of the Two Holy Mosques

King Abdullah Bin Abdulaziz Al-Saud

on 13-15/7/1429H

(16-18/7/2008)

The followers of the world religions and cultures as well as intellectuals and researchers, who took part in the World Conference on Dialogue called by Custodian of the Two Holy Mosques, King Abdullah Bin Abdulaziz Al-Saud, and organized by the Muslim World League (MWL) in Madrid, Spain during 13-15/7/1429H (16-18/7/2008) express their full appreciation to Custodian of the Two Holy Mosques, King Abdullah Bin Abdulaziz Al-Saud, for his patronage and inauguration of the Conference as well as for his speech to the participants which they have considered as one of the main documents of the Conference.

They express their full appreciation to H.M. King Juan Carlos I of Spain for his participation in the Conference with a comprehensive welcome speech and to H.E. Mr. Jose Luis Rodriguez Zapatero, Prime Minister of Spain, for his participation in the inaugural session of the Conference and for his efforts in the dialogue of civilizations, and to the Spanish Government for holding the Conference in Spain, which possesses a historical heritage that belongs to the followers of different religions and has contributed to the human civilization.

They recall the objectives of the Charter of the United Nations, which call for exerting common efforts to strengthen international relations, seek an ideal human society and focus on dialogue as a civilized way of cooperation.

They also recall the 1994 United Nations General Assembly Declaration of Principles, which call for tolerance and the spread of the culture of peace, as well as its consideration of 1995 as the year of tolerance and its declaration of 2001 as the year of dialogue among civilizations.

They acknowledge the Appeal of Makkah issued by the International Islamic Conference for Dialogue, called by Custodian of Two Holy Mosques, King Abdullah Bin Abdul Aziz Al-Saud, and organized by the Muslim World League earlier in 2008.

They set out from the agreement among the followers of religions and cultures on the value of dialogue as the ideal way of mutual understanding and cooperation in human relations and peaceful coexistence among the nations.

Hence, they affirm the following principles:

1. Unity of mankind as its origin is one, and equality among human beings irrespective of their colours, ethnic backgrounds and cultures.

2. Human beings suffer from interior division between evil inclination and love for good and justice. With divine help and their active participation, they can dominate what in them is evil and progress on the path of good.

3. Diversity of cultures and civilizations among people is one of the Signs of God and a cause for advancement and prosperity of humanity.

4. The religions aim at realizing that people are obedient to their Creator, and at achieving happiness, justice, security and peace for all mankind. The religions seek to strengthen the ways of mutual understanding and coexistence among people despite the differences of their roots, colours and languages. The religions call for dissemination of virtue with wisdom and politeness and for rejection of extremism and terrorism.

5. Promote respect for religions and their symbols, so avoiding the derision of what people consider sacred.

6. Respecting human dignity, promoting human rights, observing peace, honouring agreements and respecting unique traditions of peoples and their right to security, freedom and self-determination are the basis for building good relations among all people. Achieving this is a major objective of all religions and prominent cultures.

7. The significance of religion and moral values, and the return of human beings to their Creator in confronting crimes, corruption, drugs, and terrorism, and in preserving the family as well as in protecting the societies from deviations.

8. Family is the basis of society and its cornerstone, and its preservation as well as protection from disintegration is essential for any secure and stable society.

9. Dialogue is one of the necessities of life. It is also one of the most important means of mutual understanding, cooperation, exchange of benefits, and realization of the truth, which contributes to the happiness of humankind.

10. The preservation of environment and nature of the earth as well as its protection from pollution and other environmental dangers constitute a basic objective of religions and cultures.

In order to cooperate in realization of the above-mentioned principles through dialogue, the Conference reviewed the process of dialogue and its impediments, keeping in mind, the catastrophes which afflicted humanity in the 20th century, and in view of the fact that terrorism is one of the most serious obstacles in the way of dialogue and coexistence, and that it is a global phenomenon which requires the international efforts to combat it with the spirit of seriousness, responsibility and justice through an agreement that determines the meaning of terrorism, addresses its root causes and achieves justice and stability in the world.

Based on the above, the Conference recommends the following:

1. To reject the theories which call for clash of civilizations and cultures, and warn against the gravity of campaigns that seek to deepen the dispute and destabilize peace and coexistence.

2. To strengthen the common human values, cooperate in disseminating them in the societies and solve the problems which obstruct them.

3. To disseminate the culture of tolerance and mutual understanding through dialogue so that it becomes a framework of international relations by holding conferences and symposiums, as well as by developing cultural, educational and media programmes which lead to it.

4. To agree on the rules of dialogue among the followers of religions and cultures through which noble values and moral principles are consecrated as common values for the followers of religions and cultures in order to strengthen stability and achieve prosperity for human beings.

5. To work on issuing a document by the governmental and non-governmental international organizations that includes the respect of religions and their symbols, as well as the prohibition of their denigration and the incrimination of those who commit such denigration.

To fulfil these objectives of dialogue that the Conference looks forward to achieve, the participants agreed on adopting the following means:

1. Formation of a working team to study the problems that hinder dialogue and come in way of realizing its desired results, and prepare a study that includes visions for solution of these problems.

2. Cooperation among religious, cultural, educational and media institutions to consolidate the moral values, and encourage the noble social practices as well as to confront the sexual promiscuity, family disintegration and other vices.

3. To organize joint conventions and meetings, conduct researches, prepare media programmes, and use the Internet and other information media to disseminate the culture of dialogue, mutual understanding and peaceful coexistence.

4. To incorporate the issues of dialogue among the followers of religions, civilizations and cultures into the educational, cultural, media and youth activities.

5. To call upon the United Nations General Assembly to support the outcome reached by the Conference, and to benefit from it to push the dialogue among the followers of religions, civilizations and cultures by holding a special session on dialogue.

The Conference participants hope that Custodian of the Two Holy Mosques, King Abdullah Bin Abdulaziz Al-Saud, will exert his efforts for holding this session as soon as possible. It will be a pleasure for them to take part in that session through a delegation that represents them and is selected by the Muslim World League.

In their commitment of the principles and concepts which the Conference has agreed upon, the participants stress the need that dialogue remains open and is held periodically.

They have extended their gratitude to the appeal and invitation of Custodian of the Two Holy Mosques, King Abdullah Bin Abdulaziz Al-Saud, for this world dialogue. They have also expressed their appreciation to the Muslim World League and other bodies that cooperated with it in organization of this Conference. They have commended the constant efforts of the Muslim World League in areas of dialogue and cooperation among nations and peoples, hoping that common human objectives which mankind looks forward are well accomplished.

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15/7/1429H
(18/7/2008)

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General Assembly

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Sixty-third session
Item 106 (a) of the provisional agenda*
Elections to fill vacancies in subsidiary organs and other elections

Election of twenty members of the Committee for Programme and Coordination

Note by the Secretary-General

1. In accordance with Economic and Social Council resolution 2008 (LX) and General Assembly decision 42/450, the members of the Committee for Programme and Coordination are nominated by the Council and elected by the Assembly.

2. The membership of the Committee in 2008 is as follows (the term of office expires on 31 December in the year indicated):[1] Argentina (2008); Armenia (2008); Bangladesh (2010); Belarus (2008); Benin (2008); Brazil (2008); Bulgaria (2008); Central African Republic (2008); China (2010); Comoros (2009); Cuba (2008); France (2009); Haiti (2009); India (2008); Indonesia (2008); Iran (Islamic Republic of) (2008); Israel (2008); Italy (2008); Jamaica (2010); Kenya (2010); Libyan Arab Jamahiriya (2010); Niger (2010); Pakistan (2008); Portugal (2008); Republic of Korea (2010); Russian Federation (2009); Senegal (2008); South Africa (2008); Switzerland (2008); Uruguay (2008); Venezuela (Bolivarian Republic of) (2009); and Zimbabwe (2009).

3. The General Assembly, at its sixty-third session, will be called upon to elect 20 members, on the nomination of the Economic and Social Council, to fill the vacancies in the Committee that will occur on 31 December 2008 upon the expiration of the terms of office of the following members: Argentina, Armenia, Belarus, Benin, Brazil, Bulgaria, Central African Republic, Cuba, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Pakistan, Portugal, Senegal, South Africa, Switzerland, Uruguay and one member from Western European and other States (unfilled vacancy).

* A/63/150.

[1] There are two vacancies in the Western European and other States for members whose terms of office would begin on the date of election. One term would expire on 31 December 2008 and the other on 31 December 2009.

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4. In accordance with General Assembly decision 42/450, the vacancies are to be filled as follows:

(a) Four members from African States;

(b) Four members from Asian States;

(c) Three members from Eastern European States;

(d) Four members from Latin American and Caribbean States;

(e) Five members from Western European and other States.

5. By its decisions 2008/201 C and 2008/201 E, the Economic and Social Council nominated the following 17 Member States for election by the General Assembly at its sixty-third session for a three-year term beginning on 1 January 2009: Argentina, Armenia, Belarus, Brazil, Central African Republic, Cuba, Guinea, India, Iran (Islamic Republic of), Italy, Kazakhstan, Nigeria, Pakistan, Spain, Swaziland, Ukraine and Uruguay.

6. The geographical distribution of the nominated Member States is as follows:

(a) African States (four vacancies): Central African Republic, Guinea, Nigeria and Swaziland;

(b) Asian States (four vacancies): India, Iran (Islamic Republic of), Kazakhstan and Pakistan;

(c) Eastern European States (three vacancies): Armenia, Belarus and Ukraine;

(d) Latin American and Caribbean States (four vacancies): Argentina, Brazil, Cuba and Uruguay;

(e) Western European and other States (five vacancies): Italy and Spain.[2]

[2] The Council postponed the nomination of three members from Western European and other States for a three-year term beginning on 1 January 2009 (decision 2008/201 E).

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Sixty-third session
Item 67 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Extrajudicial, summary or arbitrary executions

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions,** Philip Alston, submitted in accordance with General Assembly resolution 61/173.

* A/63/150 and Corr.1.
** The report was submitted late in order to reflect the most recent information.

08-46771 (E) 190908

Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions

Summary

In the present report the Special Rapporteur notes the outstanding requests he has made to visit States and reports on his most recent visits. The bulk of the report addresses two neglected but vital dimensions of the struggle to combat impunity for extrajudicial executions: the provision of effective witness protection arrangements; and the importance of ensuring that military justice systems are compatible with human rights standards. In many States witness protection programmes are wholly inadequate, and military justice systems are structured in ways that promote impunity for killings. The report surveys best practices in both areas.

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I. Introduction

1. The present report focuses on outstanding country visit requests and provides a brief note on visits undertaken since the previous report to the General Assembly. The bulk of the report addresses two neglected but vital dimensions of the struggle to combat impunity for extrajudicial executions: the provision of effective witness protection arrangements; and the importance of ensuring that military justice systems are compatible with human rights standards. In many States, witness protection programmes are wholly inadequate and military justice systems are structured in ways that promote impunity for killings. The report surveys best practices in both areas.

2. While the challenges of every country are unique, there is much to learn from how others have confronted similar challenges. This report draws on both the own experiences of the Special Rapporteur and on recent research to survey some approaches to providing witness protection and reforming military justice systems.

3. In the preparation of the report, the Special Rapporteur is grateful to Mr. William Abresch of the Project on Extrajudicial Executions at New York University School of Law, who has provided superb assistance and advice, as well as to Mr. Euan MacDonald for an excellent review of issues relating to witness protection.

II. Country visits

A. Visits requested

4. Since the previous report of the Special Rapporteur to the General Assembly, the Governments of Afghanistan and the United States of America have issued invitations at my request. As of August 2008, I have requested visits to 34 countries and the Occupied Palestinian Territories. Only 11 of those — Afghanistan, the Central African Republic, Guatemala, Israel,[1] Kenya,[2] Lebanon, Nigeria, Peru, the Philippines, Sri Lanka and the United States of America — have actually proceeded with plans for a visit. The visit to Peru was cancelled, and the Palestinian Authority issued an invitation.

5. The responses of the remaining 23 countries have ranged from complete silence through formal acknowledgement to acceptance in principle but without meaningful follow-up, to outright rejection. In some cases, the relevant requests were first made some eight years ago.

6. States which have so far failed to respond affirmatively to requests for a visit are: Algeria, Bangladesh, China, El Salvador, Guinea, India, Indonesia, Iran (Islamic Republic of), Israel, Lao People's Democratic Republic, Nepal, Pakistan, Russian Federation, Saudi Arabia, Singapore, Thailand, Trinidad and Tobago, Togo, Uganda, Uzbekistan, Venezuela (Bolivarian Republic of), Viet Nam and Yemen.

[1] Israel agreed to issue an invitation to visit in connection with the visit of the Special Rapporteur to Lebanon after the conflict in 2006. To date, however, it has yet to respond favourably to repeated requests to visit in relation to issues relating to the Occupied Palestinian Territories.

[2] The Government has issued an official invitation and the mission is proposed to take place in December 2008.

7. Seven members of the Human Rights Council have failed to issue requested invitations, most of which have been pending for several years: Bangladesh, China, India, Indonesia, Pakistan, Russian Federation and Saudi Arabia. This is noteworthy in view of the pledges offered in connection with elections to the Human Rights Council and of provisions in the code of conduct for special procedures mandate-holders of the Human Rights Council urging all States to cooperate with, and assist, the special procedures in the performance of their tasks.[3]

B. Updates on visits undertaken

Brazil

8. The Special Rapporteur visited Brazil, including Brasília, São Paulo, Rio de Janeiro, and Pernambuco, from 4 to 14 November 2007. The major problem identified was the very high rate of homicide, accompanied by relative impunity. Between 45,000 and 50,000 homicides are committed every year in Brazil. Although these killings have sown widespread fear and insecurity among the general population, remarkably little is done in the vast majority of such cases to investigate, prosecute and convict the culprits. Other major concerns include (a) killings by vigilante groups, death squads, extermination groups and militias; (b) prison killings; and (c) killings by police.

Central African Republic

9. The Special Rapporteur visited the Central African Republic, including Bangui, Bossangoa, and Paoua, from 31 January to 7 February 2008. The preliminary report of the Special Rapporteur identified killings by the military, combined with the de facto impunity of those responsible, as the main issue. Other problems included killings by soldiers for personal reasons or in connection with corruption efforts, killings in police custody or detention facilities, and killings of those accused of witchcraft ("sorcery" or "charlatanism").

Afghanistan

10. The Special Rapporteur visited Afghanistan from 4 to 15 May 2008, including Helmand, Kabul, Kandahar, Kunar, Nangarhar, Jowzjan and Parwan. Afghanistan is engulfed in an armed conflict in which large numbers of avoidable killings of civilians are being tolerated. If the situation is to improve police killings must cease; widespread impunity within the legal system for killings must be rejected; the killing of women and girls must end; and the international military forces must ensure real accountability for their actions. Responding to the latter concerns, a spokesman of the North Atlantic Treaty Organization attacked "the substance and the overall tone" of the statement by the Special Rapporteur, calling it "inaccurate and unsubstantiated". The spokesman did not, however, consider it necessary to address any of the substantive concerns the Special Rapporteur identified. This is regrettable and the final report of the Special Rapporteur will deal with that issue in detail.

[3] See A/HRC/5/1/Add.1.

United States of America

11. The Special Rapporteur visited the United States of America from 16 to 30 June 2008, including Washington, New York, Montgomery (Alabama), and Austin (Texas). Without significant reforms to the criminal justice system innocent people are clearly at risk of execution. Measures are needed to enhance judicial independence, ensure adequate defence counsel, and review capital cases on the merits at the appellate level. Other recommendations concern improving the transparency of the military justice system, ensuring accountability for private security contractors, and building on existing efforts to provide reparations to victims in armed conflict. The Special Rapporteur also addressed deaths in immigration detention facilities, due process concerns in death penalty cases against "alien unlawful enemy combatants", and the deaths of detainees at the U.S. military facility at Guantánamo Bay.

III. The role of witness protection in ending the cycle of impunity for extrajudicial executions

12. The successful prosecution of those responsible for extrajudicial executions is difficult, if not impossible, in the absence of effective witness protection programmes. All too rarely are prosecutions built on painstaking forensic and other investigative work which would reduce the need to rely upon witnesses. If witnesses can be easily intimidated, if they and their families remain vulnerable, or if they sense that the protections offered to them cannot be relied upon, they are unlikely to testify. As a result, it is often the case that the only people willing to take the risk of testifying are the victims' family members. Usually, however, they are poorly placed to provide the most compelling evidence against the perpetrators. Ending impunity for killings thus requires institutionalizing measures to reduce the risks faced by witnesses who testify. Yet it is often the States that have the biggest problems that also have the least adequate witness protection arrangements.[4] Similarly, many States have sophisticated programmes to protect witnesses to murders involving organized crime, but they devote much less attention to protecting witnesses to murders implicating their military or police forces. This latter challenge requires distinctive solutions, in part because relying on the police to provide protection may itself compromise at least the appearance and often the reality of protection.

13. The central importance of effective witness protection programmes in efforts to combat extrajudicial executions has been generally overlooked by the international community and there have been all too few efforts to encourage States to devote the necessary efforts and resources to the issue. This report thus aims to highlight examples of global best practice and identify some of the key issues that need to be addressed in the design of effective programmes. The resulting survey is far from comprehensive and relies heavily upon scholarly works, reports

[4] See A/HRC/8/3/Add.4, paras. 19 and 21 (d) (Brazil); A/HRC/4/20/Add.2, paras. 51 and 63 (Guatemala); A/HRC/8/3/Add.2, paras. 52-54 and 71 (Philippines); and E/CN.4/2006/53/Add.5, para. 56 (Sri Lanka).

commissioned by governments, and observations from country visits by the Special Rapporteur.[5]

14. The starting point for effective programmes is to acknowledge that the successful prosecution of killers is in the best interests of the society. Witness protection should thus not be seen as a favour to the witnesses who are in fact often making immense personal sacrifices on behalf of society. The provision of adequate assistance to witnesses, family members, and others against whom retaliation is feared, is thus a necessary condition for breaking the cycle of impunity. Such assistance must be provided in a constructive and pragmatic spirit. Dogmatic approaches must be avoided. For example, witnesses may consider the whole of the security forces to be systematically engaged in abusing rights, while the government may believe that the security forces are basically reliable despite the presence of rogue officers in some specific units. In such cases, it is tempting for the government to adopt a dogmatic attitude and insist that any protection be provided by the security forces, thus refuting assumptions that systemic problems exist. A pragmatic approach, however, would place a premium on winning the trust of the witnesses and would provide protection in the most effective and acceptable manner.

A. Witness protection as a challenge for the whole criminal justice system

15. Witness protection cannot be viewed as an isolated challenge. Rather, it must be seen as a crucial part of a comprehensive system designed to effectively investigate, prosecute, and try perpetrators of human rights abuse. Witness protection will be ineffective if the other components of the criminal justice system are not also functioning well. Moreover, a holistic approach will help to identify ways in which less reliance can be placed on testimonial evidence and methods of witness protection which do not require full-blown witness protection programmes. Every step of the process from investigation through conviction and incarceration should be analysed to identify ways in which witnesses are placed at risk and potential reforms designed to limit those risks.

1. The investigative phase

16. Already at this phase there can be problematic disclosures of witness identities. When this risk is foreseen by witnesses, they may simply choose not to speak with investigators. Conversely, safeguarding the identity of a witness at this early point enhances the potential for safely obtaining testimony at trial without resorting to a full-blown witness protection programme. A British report identified several policing methods designed to limit risks in the early phases of the investigation:

- Police should give only minimal information about witnesses over their radios

[5] Particularly helpful resources included: Law Commission of India, *Consultation Paper on Witness Identity Protection and Witness Protection Programmes* (Aug. 2004); K. Dedel, *Witness Intimidation* (US Department of Justice, July 2006); N. Fyfe and J. Sheptycki, "International Trends in the Facilitation of Witness Co-operation in Organized Crime Cases", 3 *European Journal of Criminology* (2006) 319; Council of Europe, *Report on Witness Protection (Best Practice Survey)* (1999); and P. Finn and K. M. Healey, *Preventing Gang- and Drug-Related Witness Intimidation* (National Institute of Justice, Nov. 1996).

- Police should not visit witnesses on the day of the incident, and should either encourage the witness to come to the station to give a statement, send a plain-clothes officer to the home of the witness, or conduct a number of house-to-house calls in order to prevent the witness from being singled out. The choice should be left to the witness
- Physical screens hiding the witness from the suspect should be used in all identity parades
- A suspect should not be released when the witness is in the vicinity of the police station
- Police should warn witnesses of the risks of potential retaliation in a pragmatic manner that facilitates both their security and their cooperation
- A contact officer should be provided, so that any intimidation can be reported and acted upon immediately
- In some cases, police can hold suspects on remand and restrict their telephone rights to prevent them from contacting witnesses or accomplices to encourage intimidation[6]

17. In the special case of crimes implicating police or other state agents, the institutional affiliation of investigators may lead to an actual or perceived risk that witness identities will be improperly disclosed. This risk may be mitigated through respect for international norms requiring the removal of suspected perpetrators from positions of power or control over witnesses.[7] The existence of respected police internal affairs units might also foster confidence on the part of witnesses. But breaking the cycle of impunity will often require an independent investigative unit devoted to solving crimes involving members of the police or security forces.[8] Thus, for example, the Department of Special Investigation in Thailand was established partly to facilitate the investigation of such cases. Another approach is to remove responsibility for this kind of investigation from the normal investigative police to some other existing body. In Brazil, the Public Prosecutor's Office sometimes directly investigates murders implicating the police, even though criminal investigations are normally conducted by police detectives.[9]

18. Reforms designed to improve the collection of non-testimonial evidence should also be considered. In his visits to countries, the Special Rapporteur observed that investigators often lack the training and resources required to gather forensic evidence — e.g. to match a bullet to a particular gun — leading to

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[6] W. Maynard, *Witness Intimidation: Strategies for Prevention*, Crime Detection and Prevention Series No. 55, London: Home Office Research Development and Statistics Directorate (1994), pp. 26-30.

[7] See Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para. 15. For the test of the Principles, see *Official Records of the Economic and Social Council, 1989, Supplement No. 1* (E/1989/89), res. 1989/65, annex.

[8] See para. 22 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, 27 August to 7 September 1990 (A/CONF.144/28/Rev.1); and para. 11 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para. 11 (see note 7 above).

[9] See A/HRC/8/3/Add.4, para. 21 (f).

excessive reliance on witness testimony.[10] Insofar as the capacity to use forensic evidence can be increased, both the importance of witness testimony and the risks posed to witnesses may be reduced.

2. Prosecutorial arrangements

19. The role played by prosecutors in the criminal justice system may also lead to real or perceived risks that prevent the safe cooperation of witnesses. Prosecutors generally have close professional relationships with the police, who usually gather the evidence on which their cases are based and often testify in court. These close relationships can lead witnesses to perceive, sometimes correctly, that prosecutors will not push the case aggressively (which makes becoming a witness a pointless risk) or will even be likely to improperly disclose witness identities or locations to implicated members of the police force. There are a number of possible responses to this problem. One is to assign a few prosecutors to work solely on cases involving the police or other government agents in human rights abuses, thus seeking to minimize the normal professional solidarity between prosecutors and police. In one Brazilian city I observed that a prosecutor who played this role had earned the trust of victims of police violence despite their wariness of the prosecutor's office as a whole.[11] Another approach is to establish a separate institution for the prosecution of police. In the Philippines, for example, a special institution was established to investigate and prosecute crimes and other misconduct committed by public officials and its independence from the executive branch was constitutionally guaranteed.[12]

3. Conduct of trials

20. The manner in which trials are conducted has both indirect and direct implications for witness protection. Scheduling and venue decisions, for example, can have a major bearing on witness participation and protection, but their importance is often overlooked. Opportunities for witness intimidation increase when trials are repeatedly delayed or are not held on consecutive days. Even if the overall workload of the courts makes delays inevitable in many cases, it is worth considering whether the kinds of cases that generally place witnesses at risk can be expedited.[13] Similarly, judges should avoid summoning witnesses on days other than when they have been scheduled to testify.[14] The way in which rules on venue changes are interpreted is also important. Whether or not they are in a formal witness protection programme, witnesses often relocate to avoid retaliation; if the trial venue can be changed to accommodate their need to remain at a distance from where the perpetrator or his associates live, this can facilitate witness participation.

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[10] See A/HRC/8/3/Add.4, para. 21 (c) (Brazil); A/HRC/4/20/Add.2, para. 48 (Guatemala); E/CN.4/2006/53/Add.4, paras. 89 and 105 (b) (Nigeria); A/HRC/8/3/Add.2, para. 55 (Philippines); and E/CN.4/2006/53/Add.5, para. 56 (Sri Lanka).

[11] For preliminary observations on Brazil, see A/HRC/8/3/Add.4.

[12] See Constitution of the Republic of the Philippines (1987), art. XI, sect. 13; see also A/HRC/8/3/Add.2, paras. 56-58.

[13] For an example of one approach, see Philippines Administrative Order No. 25-2007, "Designation of Special Courts to Hear, Try and Decide Cases Involving Killings of Political Activists and Members of Media" (1 March 2007); see also A/HRC/8/3/Add.2, para. 59.

[14] See also the 154th Report of the Law Commission of India, *On the Code of Criminal Procedure 1973* (1976), pp. 43-44.

21. Permitting witnesses to give testimony anonymously is one of the most controversial but important ways of protecting them. It avoids the need for relocation and other protection measures and can be arranged in such a way as to offer relatively assured protection. But anonymous testimony risks violating the defendant's right to fair hearing and "to examine, or have examined, the witness against him".[15] For that reason, courts have subjected such schemes to close scrutiny,[16] while at the same time leaving some space for approaches designed to protect both the due process rights of defendants and the lives of witnesses. Procedures and criteria for permitting anonymous testimony that attempt to respect these rights have been developed by a large number of states,[17] as well as by the International Criminal Tribunal for the Former Yugoslavia (ICTY).[18] In general, the following criteria applied in New Zealand appears reasonably representative of efforts to achieve an appropriate balance:

> (4) The Judge may make a witness anonymity order if satisfied that —
>
> (a) The safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed; and
>
> (b) Either —
>
> (i) There is no reason to believe that the witness has a motive or tendency to be untruthful, having regard (where applicable) to the

[15] See International Covenant on Civil and Political Rights, General Assembly resolution 2200 (XXI), annex, art. 14.

[16] See, esp., the judgements of the European Court of Human Rights in *Kostovski* v. *The Netherlands* (1990) 12 EHRR 434; *Windisch* v. *Austria* (1991) 13 EHRR 281; *Isgro* v. *Italy* (1991) Yearbook of the ECHR, p. 151; *Doorson* v. *The Netherlands*, Reports of Judgments and Decisions 1996-II, p. 446; *Van Mechelen* v. *The Netherlands*, Reports of Judgments and Decisions 1997-III, p. 691; *Fisser* v. *The Netherlands* 13 Human Rights Case Digest (2002) pp. 65-68.

[17] Two illustrative examples are Portugal and the United Kingdom. In Portugal, Section 16 of Act. No. 93/99 of 14 July 1999 lays down the conditions precedent for any grant of anonymity to a witness: the testimony must relate to a specific group of crimes; the witness, his relatives or other persons in close contact with him must face a serious danger of attempt against their lives, physical integrity, freedom or property of a considerably high value; the credibility of the witness is beyond reasonable doubt; and the testimony provides a relevant contribution to the evidence in the proceedings. The situation in the United Kingdom is more complicated. In 1995 the Court of Appeal upheld full anonymity, provided that certain criteria were satisfied. *R* v. *Taylor* (1995), Crim. LR 253. In June 2008, however, the House of Lords held that the use of anonymous witnesses prevented the accused from adequately examining his accusers and thus violated the right to a fair trial. *R* v. *Davis* [2008] UKHL 36. The Government immediately adopted new legislation authorizing the continued use of anonymous witnesses in certain circumstances. See Criminal Evidence (Witness Anonymity) Act 2008. The human rights implications of the legislation have been strongly criticized.

[18] The ICTY held that five criteria must be satisfied to permit the use of protective measures:

1) A real fear for the safety of the witness or his or her family;

2) The testimony must be important to the prosecutor's case;

3) The Court must be satisfied that there is no prima facie evidence that the witness is untrustworthy;

4) The ineffectiveness or non-existence of a witness protection programme;

5) If a less restrictive measure would give the desired level of protection, it must be used.

See Tadić (IT-94-1), Decision on the Prosecutor's Motion Requesting Protective Measures for Victims And Witnesses (10 August 1995), paras. 53-86.

witness's previous convictions or the witness's relationship with the accused or any associates of the accused; or

(ii) The witness's credibility can be tested properly without disclosure of the witness's identity; and

(c) The making of the order would not deprive the accused of a fair trial.

(5) Without limiting subsection (4), in considering the application, the Judge must have regard to —

(a) The general right of an accused to know the identity of witnesses; and

(b) The principle that witness anonymity orders are justified only in exceptional circumstances; and

(c) The gravity of the offence; and

(d) The importance of the witness's evidence to the case of the party who wishes to call the witness; and

(e) Whether it is practical for the witness to be protected by any means other than an anonymity order; and

(f) Whether there is other evidence which corroborates the witness's evidence.[19]

22. But witness anonymity throughout a trial requires more than an appropriate legal framework. The trial itself is one of the most dangerous phases in the criminal justice process for witnesses, when they are often out in the open and thus more susceptible to intimidation; and, where a decision has been made to grant either full anonymity or confidentiality, the possibilities of their identities being disclosed are high during their visits to the courtroom, whether or not they are actually on the witness stand.[20]

23. One approach designed to avoid these dangers is to permit the use of anonymous hearsay testimony in criminal trials. But this shortcut exacerbates the normal problems associated with witness anonymity, while also depriving the accused of the right to confront his accusers in open court, even if he retains the possibility to "question" them at an earlier stage. Nevertheless, a number of states allow the use of hearsay evidence,[21] and some commentators and institutions have even called for this practice to be extended, perhaps with the introduction of safeguards such as videotaping the original statement. The Committee of Ministers of the Council of Europe has encouraged the use of statements given during the preliminary phase of the procedure as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great

[19] See section 13C of the amended New Zealand Evidence Act of 1908 (amended 1997) available at www.legislation.govt.nz/act/public/1908/0056.

[20] See P. Finn and K. M. Healey, *Preventing Gang- and Drug-Related Witness Intimidation* (U.S. Department of Justice, National Institute of Justice, Nov. 1996), p. 13.

[21] See, for example, s. 96 of the German Code of Criminal Procedure, which allows under certain circumstances for hearsay evidence to be taken from those who have questioned a witness who is to remain anonymous, and used as substantive evidence at trial. See Fyfe and Sheptycki, p. 343.

and actual danger to the witnesses/collaborators of justice or to people close to them. Consequently, pre-trial statements should be regarded as valid evidence if the parties have, or have had, the chance to participate in the examination and interrogate and/or cross-examine the witness and to discuss the contents of the statement during the procedure.[22]

24. The use of anonymous hearsay evidence in trial is thus extremely controversial. While it undoubtedly provides a high level of protection to the witness, it will most often do so at unacceptable cost to the fair trial rights of the accused, as the jurisprudence of the European Court on this matter suggests. It is beyond the scope of this report to evaluate when or whether it might be an acceptable practice.

25. One of the most common, and cost-effective, mechanisms for operationalizing anonymity orders is the erection of a screen between the witness testifying and the defendant. In many countries, the use of screens for witnesses is considered an unproblematic — if usually exceptional — measure.[23] To protect anonymity, a common practice is for the witness in question to be assigned a pseudonym, which is then used for all trial purposes and public records. If necessary to protect the witness's identity, voice-distorting technology is also used. Where the decision has been made to keep a witness's identity secret from the accused, the use of screens provides one way of balancing the right to fair trial with the exigencies of witness protection that is significantly more robust than the use of anonymous hearsay evidence in that it allows for greater cross-examination. The risk that inevitably accompanies courtroom appearances, however, is that a witness's identity will be disclosed.

26. Some of the high risks of identity disclosure associated with courtroom appearances can be lessened by giving testimony through video links. The ICTY has used this option to protect witnesses. Rule 75B(i) (c) of its Rules of Evidence and Procedure states that the Chamber can hold in camera proceedings to decide whether to allow, inter alia, the "giving of testimony through image- or voice-altering devices or closed circuit television".[24] The use of videoconferencing (that is, witnesses testifying via video-link from locations far away from The Hague) has also been allowed by the Tribunal due to the "extraordinary circumstances" in which it operates, provided that the testimony is so important that it would be unfair to proceed without it, and the witness in question is unwilling or unable to come to the seat of the ICTY. The Trial Chamber appointed a presiding officer who was to be present when the witness was testifying, to ensure that it was done freely, to identify the witness, and to administer the oath; moreover, only he and some technical staff were permitted to be present. Lastly, the witnesses had to be able to see the judge, accused and questioner on a monitor, and had to be seen by them on theirs.

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[22] See Council of Europe, Committee of Ministers, loc. cit. n. 48, at paras. 5 and 17.

[23] It is included, for example, in section 13G(1)(b) of the New Zealand Evidence Act of 1908. With respect to the United Kingdom, see also *Foster* [1995] Crim.L.R. 333. The requisite balancing was also discussed in some detail in *Donaughy Re Application for Judicial Review* (2002) NICA (8.5.2002), where police witnesses testifying in the Bloody Sunday investigations were allowed to do so from behind screens.

[24] Such measures are granted by the ICTY almost as a matter of course; see *Prosecutor* v. *Sikirica et al.*, IT-95-8 (2001) (order on request for protective measures), in which protective measures of this sort were ordered for 23 witnesses.

27. By the same token, these technological solutions come with problems of their own: Quite apart from creating a new layer of technical issues and costs, the witness is not subject to the symbolism of the courtroom, nor fully to the solemnity of its procedures. This in itself can be viewed as not entirely fair to the accused. It is for these reasons that the ICTY in *Prosecutor* v. *Dusko Tadić* saw fit to reaffirm the basic principle that witnesses should be present in the courtroom, and to extend the exceptional measure of videoconferencing only where there were good reasons as to why that was not possible.

28. Another technique which has been used to reduce the impact of such witness protecting measures on the rights of the defendant is the use of "special counsel" for the accused. This involves a court-appointed lawyer who represents the interests of the accused in any context in which witness protection measures might lessen the effectiveness of his own counsel. The special counsel thus acts in something like an *amicus curiae* capacity, representing the interests of the accused but with no legal responsibility to him. In cases in which full anonymity has been ordered, then, the special counsel could be provided with full details of the witness's identity and pose questions based thereon, without any obligation to make these known to the defence. This approach has, for example, been adopted by the United Kingdom in response to certain European Court judgements.[25]

29. A final option to which reference might be made is for judges to consider making greater use of pre-trial detention involving police defendants who are deemed likely to seek to intimidate witnesses. It is common in Uruguay for accused police officers to be detained pending trial. While a strong rule of this kind would raise due process concerns, an approach which signals a willingness to consider detention if obstruction of justice problems arise might be warranted.

B. The design of a formal witness protection programme

30. Whatever measures are introduced within the criminal justice system to lessen the risk posed to witnesses to extrajudicial executions by state agents, it will generally also be necessary to adopt a formal witness protection programme for some cases. This section considers questions of formal structure, criteria and procedures for both admission to such programmes and termination of protection, and the basic design of witness relocation plans. In addition, consideration is given to some of the challenges specific to witness protection in cases involving human rights abuse by state agents and to innovative responses that states have made in such contexts.

1. The structure of a witness protection programme

31. One of the most well-established witness protection schemes is the United States Federal Witness Security Program. In many respects it can be viewed as "paradigmatic", having served as a model for similar arrangements in other countries. It has been suggested that a comprehensive witness protection model must include: (a) an organizing committee, composed of policymakers from key

[25] See Special Judgment on Appeals Commission Act, 1997, and the Northern Ireland Act, 1998. For a discussion of this issue, see also 1997 New Zealand Law Commission report on Witness Anonymity, paras. 46-47.

stakeholders; (b) an operational team, often composed of officials of those institutions involved in the day-to-day running of the programme; (c) a programme administrator; (d) case investigators, or a specially trained law enforcement unit; and (e) designated contact people in all cooperating authorities, agencies and institutions.[26]

32. It is important that information regarding witness identities and locations be carefully safeguarded even within such a structure. Thus, for instance, while the operational team may need to weigh the range of protection options available for a particular witness, there is no reason for this information to flow upward to the group dealing with policy questions.

33. While some countries establish witness protection programmes as units within the police force, this approach is inappropriate for programmes designed to facilitate cases against state agents involved in human rights abuse. One alternative is to appoint officials in key criminal justice system institutions to a committee to administer or oversee the programme. In Belgium, for example, decisions about whom and when to protect are taken by a Witness Protection Board, consisting of public prosecutors, senior police officers and representatives of the Ministries of Justice and the Interior. Another approach is to create a witness protection agency as a separate body, funded by and ultimately responsible to the government, but with decisions on inclusion and exclusion taken by the project director rather than with broader governmental input on the matter, and with law enforcement agencies playing no direct role in the programme. It is worth noting, however, that, if an independent agency is established, it must be given the necessary resources. In some cases, notionally independent agencies have ended up depending on the police force to implement protection measures due to a lack of internal resources.

34. A formal, institutionalized structure is preferable to an informal, ad hoc one for several reasons. The first is efficiency: a formal structure can involve all key cooperating stakeholders in the planning and execution of protection programmes, thereby minimizing the risk of breakdowns in communication or cooperation, gaps in services to witnesses, and inefficient or ineffective procedures. The second is security: informal procedures involving many agencies (such as housing applications, welfare benefit transfers, etc.) are unlikely to have the necessary bureaucratic safeguards in place to ensure that the new locations or identities of protected witnesses are not too readily disclosed. The third is consistency: ad hoc arrangements are extremely sensitive to changes in personnel at the various cooperating agencies. The fourth is communication: formal, structured programmes assign witnesses with a single, constant contact person, who can provide the round-the-clock support and assistance that many witnesses require if they are to testify. It is important that witnesses are able to build up relationships of trust with the programme administrators with whom they deal, and this is not possible if the latter keep changing. The final reason for preferring a formal, structured programme is evaluation. Frequent and well-planned evaluations are critical to the success of any witness protection effort, allowing administrators to fine-tune the programme and prevent any errors that may have been made from happening again.[27]

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[26] See Finn and Healey (see note 20 above), pp. 59-74.

[27] Ibid., pp. 59-60.

35. With respect to criteria for admission to the programme, key considerations include: (a) the importance of the case in terms of ending a cycle of impunity for human rights abuse; (b) the importance of the witness's testimony to the case; (c) the level of threat to the witness; (d) the suitability of the witness for the programme, including whether he or she is genuinely willing to relocate and break ties with family and friends; and (e) the availability and adequacy of less onerous forms of protection.[28]

36. It is equally important to develop a clear set of criteria as to when the programme participation of a witness or family member may be terminated. Most jurisdictions provide for termination if the participant breaks any of the rules of conduct that have been agreed upon (on which more below), if they in some way threaten the security of the programme itself, or if the circumstances which necessitated the original provision of protection have ceased to exist. They also always provide for some sort of review by an official or body other than the programme director or administrator.[29] The provisions of the Witness Protection Act of South Africa are perhaps among the clearest and most detailed in this regard, stating that the Director may discharge any protected person from protection if he is of the opinion that:

(a) the safety of the person is no longer threatened;

(b) satisfactory alternative arrangements have been made for the protection of the person;

(c) the person has failed to comply with any obligations imposed upon him or her by or under this Act or the protection agreement;

(d) the witness, in making application for placement under protection, wilfully furnished false or misleading information ...;

(e) the person refuses or fails to enter into a protection agreement when he or she is required to do so ...;

(f) the behaviour of the person has endangered or may endanger the safety of any protected person or the integrity of a witness protection programme ...; or

(g) the person has wilfully caused serious damage to the place of safety where he or she is protected, or to any property in or at such place of safety.[30]

37. The legislation also provides for the right to request a review of any decision to terminate, to be made by the relevant Government Minister.[31]

38. Establishing mechanisms for inter-agency cooperation is essential to an effective witness protection programme. Such programmes need to provide much more than simply physical protection for those in their care; a whole host of other issues inevitably arise, from health to housing and other welfare benefits and beyond. These difficulties are, moreover, compounded when witnesses are provided with new and secret identities or addresses, and, as the number of different agencies and institutions involved increases, so do the chances for either inefficient

[28] Similar criteria may be found in the legislation of a number of countries. See e.g. art. 6 of the Witness Protection Programme Act of Canada, 1996.

[29] See, for ex., the Victoria State Witness Protection Act 1991, sect. 16.

[30] Witness Protection Act of 1998, Article 13.

[31] Witness Protection Act of 1998, Article 14.

bureaucratic procedures, opportunities to exploit the system or security lapses. The risk of all three can be minimized by employing certain good practices including:

(a) Establishing a contact person within each agency who is in a position to take action when a request is made. Again, the creation and maintenance of relationships of mutual trust between individuals in the various government agencies and officials of the witness protection programme can be crucial in ensuring that requests for assistance are dealt with in a timely and efficient manner;

(b) Gaining support from the top. It is important to ensure that the head of each agency is both aware and approving of the relationship between the witness protection officials and their contact person within the relevant agency, and of the actions taken by the latter at the request of the former;

(c) Developing inter-agency memorandums of understanding. These written agreements between agencies can be extremely useful in ensuring the clarity, consistency and efficiency of the inter-agency relationship. The reasons for using these are many and varied: they create stability despite personnel changes in either agency; making a commitment in writing makes agencies less likely to attempt to evade responsibility, but it also makes it less likely that they will be asked to do more than they should; and a written document serves to reduce uncertainties surrounding the role and responsibilities of each party. The contents of the memorandums will vary from context to context; however, at a minimum, each should specify the services each agency will provide, the staff and funding they will make available, and the allowable expenses or services.[32]

2. Protection measures short of relocation

39. Within the context of a formal witness protection programme, there can be a range of possible protective measures employed on the basis of a case-specific risk assessment. In some countries, the measure of first resort has been protective incarceration. Witnesses are placed in what amounts to a cell inside a police station, unused prison, or other security forces establishment. Except as an extremely temporary measure, this kind of approach must be avoided. Witnesses quite reasonably can seldom accept their own detention as a condition for participating in what will generally be a lengthy trial. Nevertheless, it is not always necessary or advisable to escalate directly to witness relocation or identity change. Sometimes it may be possible to employ lower level physical protection measures. One possibility is the provision of a "rapid response alarm", connected directly to the local police station. This allows officers to arrive quickly if any threat materializes, without having the expense of providing round-the-clock protection.[33] Another possibility may be the installation of locks, grates, security alarms and outdoor lighting for the witness's house,[34] or increasing patrols in the area. On occasion, police officers in some jurisdictions can assist by taking at-risk witnesses and their families to and from work and school for a short time. Lastly, it is common practice for police to send vulnerable witnesses to live with out-of-town relatives (as a cheap alternative to making complex and costly relocation arrangements within the witness protection

[32] Finn and Healey (see note 20), pp. 71-74; see also Kelly Dedel, *Witness Intimidation* (U.S. Department of Justice, Community Oriented Policing Services, July 2006), pp. 18-19.

[33] Maynard (see note 6 above), p. 4.

[34] Dedel (see note 32), pp. 22-23.

programme).[35] Many of these measures will, however, be generally inadequate when witnesses fear retaliation from the police or other security forces.

3. Relocation

40. Relocation is the central mechanism in effective witness protection programmes and is generally viewed as the most effective way of protecting high-risk witnesses from intimidation, threats and violence. It is, however, also often expensive and time-consuming, and it requires a high degree of inter-agency cooperation and planning if it is to be carried out effectively.[36] There are broadly three different types of relocation: emergency, short-term, and long-term/permanent.[37]

41. Emergency relocation is used when a threat is imminent and often requires an expedited initial process in terms of acceptance into the witness protection programme, with a more detailed evaluation to take place when the danger has passed. The accommodation used is very often a hotel (which is very expensive); however, it can also be a police station or another public building designated for that purpose. Such protective incarceration should, however, never last longer than a few days or weeks, at most.

42. Short-term relocation is used when the witness remains at risk for longer periods. It is in this context that the practice of sending witnesses to live with family or friends out of town is most popular, as by far the most cost-effective measure; it also provides a source of emotional support and means that a number of risks attendant to relocation measures, in particular boredom and subsequent returns to visit friends and family, are minimized.[38] However, depending on the structure of a society and the character of the threat, this may not provide adequate protection. Indeed, in some circumstances, it will only increase the danger to family members. Other possibilities include social housing or rental property. Here already, however, logistical difficulties begin to arise: it may be necessary to transfer schools; the witness will in all likelihood no longer be able to work; it may also be necessary to make arrangements for the transfer of social benefits to the other jurisdiction. As always, the more people and agencies are involved in the process, the higher the risk of disclosure of the whereabouts of the witness, accidental or otherwise.

43. Long-term/permanent relocation is most commonly used in cases in which the threat of violent retaliation does not end even with the conviction of the defendant. This has often been true in major gang-related or organized crime cases, but the same problem exists when the police or security forces continue to commit abuses with impunity and may retaliate on behalf of their convicted colleague. Permanent relocation need not be significantly more costly than its short-term counterpart. The major outlays mostly come at the beginning in any event, such as housing costs, and subsistence payments until either social security benefits can be transferred or the witness finds employment.

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[35] Finn and Healey (see note 27), p. 29.

[36] Dedel (see note 32), p. 27.

[37] Finn and Healey (see note 27), pp. 23-38.

[38] Finn and Healey (see note 27), p. 29.

4. Innovative approaches to relocation

44. There are some innovative approaches to relocation that may be useful in meeting the special challenges of protecting witnesses to human rights abuses perpetrated by state agents. These include involving foreign governments and non-governmental organizations in the implementation of relocation plans.

45. It is relatively common for non-governmental human rights advocacy organizations to help victims and witnesses on an ad hoc basis. In some cases, such assistance has been transformed into full-fledged witness protection programmes and even into joint arrangements between government and non-governmental organizations. For example, in Brazil the witness protection programme began as a project of the non-governmental organization *Gabinete de Assessoria Jurídica às Organizações Populares* (GAJOP) and was subsequently developed into a programme that involves both government agencies and a number of non-governmental organization partners.[39] Today, a committee that includes judges, prosecutors, and others, provides policy direction and makes final decisions on the admission and expulsion of witnesses while day-to-day operations are conducted by the state's secretariat for justice in tandem with a non-governmental organization.[40] The non-governmental organization receives government funds to relocate witnesses and help them integrate into a new community. This innovative structure, in which government officials are not actually informed of the witness's location, has provided witnesses to crimes committed by government agents a much higher level of protection than most systems that rely solely on the government to provide protection. However, some of the non-governmental organizations providing protection services to witnesses reported dissatisfaction with the structure of the programme and questioned the long-term viability of a programme that relies so extensively on non-governmental organization implementing partners. Non-governmental organization involvement in witness protection can be invaluable in overcoming the difficulties caused by a severe lack of trust in state institutions, and in law enforcement agencies in particular.

46. It is important to note, however, that even a strong and respected non-governmental organization will find protection difficult or impossible without corresponding government action. The process of investigation, prosecution, and trial will still require contact between witnesses and government officials, and reforms to minimize the risks posed by these contacts will still be necessary. Moreover, it is impossible for non-governmental organizations to arrange new identities for witnesses without the cooperation of numerous government agencies. Finally, the risks posed to non-governmental organization staff implementing such a programme may exceed even those posed to government witness protection personnel.

47. When secure and trusted relocation within a state's territory is not feasible, whether due to limited government capacity or to the pervasiveness of the threat, relocation to another country may be considered. South Africa is one state that has successfully resorted to international cooperation on witness protection to enable the prosecution of human rights cases. For example, in the trial of the commander of a police hit squad, Eugene de Kock, three witnesses who were police officers

[39] The involvement of non-governmental organizations also features prominently in the history of witness protection in South Africa.

[40] Law No. 9.807 (13 July 1999); Decree No. 3.518 (20 June 2000).

themselves and feared intimidation from colleagues, were sent to Denmark for 18 months. This type of cooperation is already common, on an informal basis, between the heads of the European witness protection programmes, and a best practice survey by the Council of Europe has called for more formalized action along these lines.[41] It is worth considering whether countries with established witness protection programmes could more routinely agree to relocate witnesses to their territory in order to assist countries attempting to successfully prosecute state agents so as to break with a pattern of impunity. Any such arrangement would, of course, need to take into account how witness participation in investigations and trials could be ensured. Either secure transport involving both governments would need to be provided or the provision of testimony through videoconferencing would need to be authorized.

IV. Making military justice systems human rights compatible

48. When extrajudicial executions are committed by military personnel it usually falls to the national system of military justice to investigate, prosecute and punish. Yet, historically, the human rights track record of military justice has been dismal. Commanders have routinely used their power to mete out military justice to absolve their personnel of responsibility for brutal abuses against civilians — even as they have harshly punished conscripts and enlisted men for minor breaches of military discipline. At its best, military justice has been a separate and inferior system of justice. At its worst, it has provided a pretext for impunity. In too many countries around the world military justice systems continue to have little in common with human rights and are thus ineffectual in responding to extrajudicial executions.

49. On a positive note, an increasing number of States have adopted far-reaching reforms designed to subject soldiers to criminal justice systems consistent with international human rights norms. Procedures and institutional structures have been reformed and the relevance of the civilian justice system expanded. This section reviews the experience of several countries with widely different legal traditions which have instituted major reforms. The purpose of the review is to illustrate the problems identified in the previous systems, and to show that fundamental reform is both necessary and feasible.

50. Two caveats are applicable to the following analysis. First, it is based on published analyses rather than empirical surveys.[42] There may thus be significant discrepancies between theory and practice which are not reflected here. Second, the focus is on procedures relating to violations of the right to life and not on other offences.

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[41] Council of Europe Witness Protection Best Practice Survey, 1999, p. 25.

[42] Particularly helpful resources included *Justicia Militar, Códigos Disciplinarios y Reglamentos Generales Internos, Informe Final* (eds. Gustavo Fabián Castro & Dolores Bermeo Lara) (2008); Arne Willy Dahl, "International Trends in Military Justice" (January 2008) at <http://home.scarlet.be/~ismllw/index_UK.htm>; Victor Hansen, "Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?", 16 Tulane Journal of International & Comparative Law (2008) 419; Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (2006); Federico Andreu-Guzmán, *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations* (2004); *European Military Law Systems* (ed. Georg Nolte) (2003); Eugene R. Fidell, "A World-Wide Perspective on Change in Military Justice", 48 Air Force Law Review (2000) 195.

A. Legal framework

51. The obligation to effectively investigate, prosecute, and punish violations of the right to life in situations of armed conflict has been a consistent theme of reports under this mandate.[43] The most systematic survey of the implications of international law in this area is contained in the report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights,[44] Emmanuel Decaux, which included draft principles governing the administration of justice through military tribunals. These principles state that "the jurisdiction of military courts should be limited to offences of a strictly military nature".[45] That jurisdiction "should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes".[46]

52. The principles also state that "the organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. The persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy".[47]

53. Violations of these norms affect the rights of both the accused and the victims. The Inter-American Court of Human Rights has emphasized the "close connection"[48] among these rights, has developed a unified jurisprudence looking at questions of independence and jurisdiction from both perspectives, and has gone so far as to refer to the rights of victims to due process.[49]

B. Case studies

1. United Kingdom

54. The United Kingdom provides an important case study in rapidly transforming a military justice system of ad hoc courts-martial dominated by military commanders, of the type that still exists in many other States today, into one overseen by a standing court and independent and professional prosecutors and judges.

55. While national institutions drove the reform process, the European Court of Human Rights played a catalytic role.[50] In *Findlay* v. *the United Kingdom*, the European Court ruled that the British system of military justice was incompatible

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[43] See, for ex., E/CN.4/1995/61, para. 93; E/CN.4/1999/39, para. 67; and E/CN.2006/53, paras. 33-43.

[44] E/CN.4/2006/58.

[45] Ibid, paras. 29-31 (Principle No. 8).

[46] Ibid., paras. 32-35 (Principle No. 9).

[47] Ibid., paras. 45-48 (Principle No. 13).

[48] See *Vargas-Areco* v. *Paraguay* (2006), para. 73.

[49] *Las Palmeras Case* (2001), para. 54.

[50] M. Oakes, *The Armed Forces Bill*, House of Commons Research Paper 01/03 (8 January 2001), p. 12.

with the requirement of the European Convention on Human Rights of an "independent and impartial tribunal".[51] At that time, the British system conferred broad authority on the "convening officer", who was an officer with command authority over the accused.[52] Among other responsibilities, the convening officer would decide which charges would be brought, choose the members of the court-martial (who could be his subordinates), and appoint the prosecuting officer.[53] The convening officer could also "discontinue the court-martial either before or during the trial".[54] The convening officer also generally played the role of the "confirming officer" with the power to "withhold confirmation or substitute, postpone or remit in whole or in part any sentence".[55] Thus, those responsible for judging the accused would be appointed by and often be subordinate to the accused's commanding officer. Moreover, the ultimate authority both to prosecute and to sentence rested with the commander. The role of the Judge Advocate General was limited to providing advice to the convening officer, the members of the court-martial, and the confirming officer.[56]

56. The far-reaching reforms in the United Kingdom began in 1996.[57] While the new system leaves commanders with considerable discretion in conducting summary hearings for various disciplinary breaches,[58] it shifts most authority to professional investigators and prosecutors in relation to serious crimes, such as murder. In such cases, the commanding officer is obligated to bring the crime to the attention of the military police.[59] The police must investigate and, should the evidence warrant, refer the case to the Director of Service Prosecutions (DSP).[60] It is the Director of Service Prosecutions who then has the authority to direct that charges be brought.[61] (The powers of the Director of Service Prosecutions may be delegated to legally qualified "prosecuting officers" appointed by him.[62]) The Court Martial, a standing body, itself is composed of a judge advocate and a number of "lay members".[63] The judge advocate is appointed by the Judge Advocate General, and the lay members, who are officers or warrant officers, are appointed by the "court administration officer".[63] The judge advocate makes binding rulings on questions of law and procedure, the lay members make the finding as to guilt, and

[51] European Convention on Human Rights, art. 6 (1); European Court of Human Rights, *Findlay* v. *the United Kingdom*, judgement of 25 February 1997, paras. 68-80.

[52] *Findlay* (see note 51 above), para. 36.

[53] Ibid., paras. 34-37.

[54] Ibid., para. 40.

[55] Ibid., para. 48.

[56] Ibid., paras. 42-45.

[57] Armed Forces Act 1996; Armed Forces Discipline Act 2000; Armed Forces Act 2001; Armed Forces Act 2006. With respect to the phased implementation of reforms, see Armed Forces Act 2006, para. 383, and the statutory instruments made by the Secretary of State, including especially those made on 10 May 2007, 8 October 2007 and 24 June 2008.

[58] The Bill's provisions retain the Commanding Officer at the centre of the summary dealing process, which represents more than 95 per cent of Service discipline cases. House of Commons, Session 1995-96, *Special Report from the Select Committee on the Armed Forces Bill*, HC 828-I (30 April 1996), para. 43.

[59] Ibid., paras. 113-115.

[60] Ibid., para. 116.

[61] Ibid., paras. 113-122.

[62] Ibid., para. 365.

[63] Ibid., para. 155.

the lay members and the judge advocate together decide on the sentence.[64] If someone is convicted by the Court Martial, he or she may appeal the conviction and sentence to the Court Martial Appeal Court.[65] The Attorney General may also refer a case to this appeal court if he concludes that the sentence imposed by the Court Martial was "unduly lenient".[66] Points of law may also be referred to the country's highest court.[67]

57. Decision-making authority has, thus, been shifted from commanders to the Director of Service Prosecutions, Judge Advocate General, and court administration officers. In varying manners and to varying degrees, provisions have been made to ensure that these institutions are independent from each other, the chain of command, and the executive branch. The Director of Service Prosecutions is legally qualified and appointed by the Queen.[68] The Judge Advocate General is appointed by the Queen on the recommendation of the Lord Chancellor.[69] The court administration officer of the Court Martial is appointed by the Defence Council, which is chaired by the Secretary of Defence.[70]

58. There are also lessons to be learned from a reform process that has made periodic reviews of the military justice system routine.[71] In the United Kingdom, as a matter of constitutional law, statutes establishing the military justice system will lapse unless parliament enacts new legislation every five years. In practice, this has meant that both the Ministry of Defence and a special committee established by the lower house of parliament systematically review the existing military justice system in light of the experience of the intervening years, changed circumstances and human rights norms.[72]

2. Colombia

59. Reforms adopted in Colombia provide a case study in transferring jurisdiction over serious human rights violations, such as extrajudicial executions, from military jurisdiction to that of ordinary courts.

60. The reform process in Colombia has been driven by efforts to interpret and apply the provisions of the Constitution of 1991, including its provision that crimes committed by members of the military and police are subject to military jurisdiction when they are "in active service" and the conduct was "in relation to that service".[73] In 1997 the Constitutional Court held that this must be construed narrowly to require a "proximate and direct" link between the crime and some broader mission or task that falls within the constitutionally defined role of the security forces.[74] It

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[64] Ibid., paras. 159-160.

[65] Courts-Martial (Appeals) Act 1968, para. 8, as amended by the Armed Forces Act 2006, Schedule 8. The court itself is composed of judges and other persons with legal experience appointed by the Lord Chief Justice and the Lord Chancellor.

[66] Ibid., Armed Forces Act 2006, para. 273.

[67] Ibid., para. 274.

[68] Ibid., para. 364.

[69] Courts-Martial (Appeals) Act 1951, Ch. 46, para. 29, as amended by the Armed Forces Act 2006, Schedule 16.

[70] Armed Forces Act 2006, para. 363.

[71] See also E/CN.4/2006/58, paras. 64-66 (Principle No. 20).

[72] M. Oakes [(see note 50 above), pp. 10-14] discusses this review process.

[73] See Article 221.

[74] See Sentencia C-358-97 (5 August 1997).

noted that a broader interpretation risked transforming military jurisdiction into the personal privilege of a separate military class. It held that there are acts, such as crimes against humanity, that are "so flagrantly at odds with the constitutional function of the [military and police forces] that their commission alone breaks any functional link between the agent and the service" regardless of the context in which they were committed and that, thus, must be tried by a court of general jurisdiction.[74] This reflected the court's earlier judgement that international obligations prevented the concept of due obedience from being interpreted so as to extinguish criminal liability for human rights violations committed by soldiers.[75]

61. Judgments of the Inter-American Court of Human Rights have reinforced this approach. The Court has held that "the penal military jurisdiction shall have a restrictive and exceptional scope" and may only extend to offences "against legally protected interests of military order".[76] The American Convention on Human Rights requirement that crimes be tried by a "competent" tribunal would be violated if ordinary crimes were to be tried under military jurisdiction.[77] The Court has ruled against the use of military jurisdiction in various cases, including one involving extrajudicial executions by police during a counterinsurgency operation[78] and a case in which a state's military suppressed prison riots, resulting in 111 deaths.[79]

62. In 1999, the Congress enacted a new military penal code which reiterated that military jurisdiction is contingent upon a link between the crime and a proper military function and expressly barred military jurisdiction over the crimes of torture, genocide, and enforced disappearance,[80] a list which is not considered exhaustive.[81] Similarly, in 2000, the Congress adopted a new general penal code, which contains a section on "crimes against persons and goods protected by international humanitarian law",[82] which includes "homicide of a protected person".[83]

63. Today, an extrajudicial execution by a Colombian soldier may be characterized as an offence under the ordinary penal code. This offence would then be prosecuted by the Attorney General's Office and tried before a court of general jurisdiction. Disputes regarding whether jurisdiction lies with the military justice system or the regular courts are resolved by the Supreme Judicial Council.[84]

3. Netherlands

64. Since 1991, the Netherlands has had neither military courts nor courts-martial,[85] although commanders still play a large role in disciplinary cases.[86] But

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75 Sentencia C-578/95 (4 December 1995).

76 *Durand and Ugarte* v. *Peru*, judgement of 16 August 2000, para. 117.

77 Ibid., paras. 113-131.

78 *Las Palmeras*, paras. 2, 32-47.

79 *Durand and Ugarte* (see note 76 above), para. 59.

80 Código Penal Militar, Law 522 of 1999 (13 August 1999), arts. 1-3.

81 Sentencia C-878/00 (12 July 2000).

82 Código Penal, Law 599 of 2000 (24 July 2000), Title 2.

83 Código Penal, art. 135.

84 Constitution, art. 256(6). The Supreme Judicial Council is composed of judges serving eight year terms (Constitution, art. 254). For a discussion of jurisprudence on this issue, see *Military Jurisdiction and International Law*, pp. 241-247.

85 For this legislation and its background, see *Military Jurisdiction and International Law*, pp. 293-294.

cases implicating soldiers, including those arising in armed conflict situations, are dealt with under the same system of trial and appellate review that is used for ordinary criminal cases implicating civilians.[87] However, cases involving military personnel in both the district court and the court of appeal use a special military chamber comprising two civilian judges and one military member.[88] The cases are prosecuted by a regular, civilian prosecutor attached to the Office of the Public Prosecutor (Openbaar Ministerie).[89]

65. Most rules of substantive and procedural law are provided by the general criminal code and code of criminal procedure, but there are some military-specific offences and rules included in the Military Criminal Code and Act of Military Criminal Procedure.[90] These include provisions to increase sentences and provide additional defences to criminal liability when an offence takes place in an armed conflict.[91] There is also the Laws of War Act, which criminalizes violations of "the laws and customs of war".[92]

V. Conclusions and recommendations

Witness protection programmes

66. Procedures and institutions designed to protect witnesses, including formal witness protection programmes, must be central to any overall effort to punish those responsible for extrajudicial executions. Yet, many countries in which such executions are common either have no programme worthy of the name, or one that functions very poorly.

67. The lack of serious witness protection programmes is certainly due in part to resource constraints. But much more importantly, it is a symptom of the absence of political will to ensure accountability for extrajudicial executions, especially when those suspected are police or military officers.

68. While the focus of the analysis above is on the need for carefully designed institutional and other arrangements, institutional design per se can never overcome a lack of political will.

69. The international community has recognized the importance of witness protection in contexts like the international criminal tribunals, but has failed to provide the financial, technical and political support needed to develop effective programmes at the national level in most situations where action is urgently needed.

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[86] L. Besselink, "Military Law in the Netherlands", *European Military Law Systems*, pp. 624-628.

[87] A.F.M. Brenninkmeijer, "Judicial Organization", *Introduction to Dutch Law*, pp. 56-57.

[88] L. Besselink (see note 86 above), p. 631.

[89] Ibid., p. 632.

[90] Ibid., pp. 630-631.

[91] D-J Dieben & T. Dieben, *When does War become Crime? Aspects of the Criminal Case against Eric O.* (2005), pp. 21-22; P. C. Tange, "Netherlands State Practice for the Parliamentary Year 2005-2006", *Netherlands Yearbook of International Law* (2007), pp. 307-309, 342-349 (excerpting letters from Minister of Defence to members of the parliament concerning deployments in Afghanistan and other contexts).

[92] L. Besselink (see note 86), pp. 632-636.

70. The Office of the United Nations High Commissioner for Human Rights should develop policy tools designed to encourage and facilitate greater attention to witness protection in national level programmes to combat impunity for killings and other crimes.

Military justice systems

71. In too many countries around the world military justice systems are incompatible with human rights obligations. The impunity that they foster also makes them ineffectual in responding to extrajudicial executions.

72. Governments should periodically review their military justice systems in light of human rights norms and trends in state practice.

73. The General Assembly should call upon all States to report on the extent to which their existing arrangements comply with human rights standards.

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Administration of justice at the United Nations

Administration of justice at the United Nations

Report of the Secretary-General**

Summary

The General Assembly, by its resolution 62/228, approved the framework of a new system of administration of justice in the United Nations, to be introduced as of January 2009. The new system will include a stronger emphasis on informal resolution of employment-related disputes through the strengthening and decentralization of the Office of the Ombudsman, and, on the formal side, it will consist of a first instance United Nations Dispute Tribunal and a second instance United Nations Appeals Tribunal. In the same resolution, the General Assembly requested the Secretary-General to submit, for consideration by Member States, draft statutes of the two new tribunals and proposals for transitional arrangements for transferring cases from the current system of internal justice to the new one. The draft statutes and other information that the General Assembly had requested to be submitted to it at its second resumed sixty-second session are set out in the report of the Secretary-General dated 3 April 2008 (A/62/782) and his note dated 8 April 2008 (A/62/748 and Corr.1). The Advisory Committee on Administrative and Budgetary Questions has reviewed the report of the Secretary-General, but it has not yet been considered by the General Assembly.

* A/63/150 and Corr.1.

** The delay in the submission of the present report was due to the need for extensive internal consultations.

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The present report responds to additional requests for information contained in resolution 62/228 relating to the new system of administration of justice. It includes options for the delegation of authority for disciplinary matters, and a detailed description of the Secretary-General's plan to proceed with limited delegation of authority in a phased manner, beginning with six peacekeeping missions, and the prerequisites that need to be in place for such delegation to be feasible. It also provides information on other issues, including the idea of a staff-funded scheme for legal assistance for staff; how information and communications technology can be used to assist the system of administration of justice; mechanisms for the formal removal of judges; and the proposed conditions of service of judges in the new system.

The Secretary-General requests the approval of the General Assembly for the proposed course of action relating to the limited delegation of authority for disciplinary matters. The approval of the Assembly is also sought on the proposed revisions to the Staff Regulations related to the introduction of the new system of administration of justice and the conditions of service of the judges of the Dispute and Appeals Tribunals.

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I. Introduction

A. Background

1. At its sixty-second session, the General Assembly decided to introduce a new system of administration of justice in the United Nations to handle employment-related disputes that was intended to be professional, transparent, expedient and decentralized. It was based on the proposals of the Secretary-General contained in his note of 23 February 2007 (A/61/758) and his report of 23 August 2007 (A/62/294), which were derived from recommendations made by the Redesign Panel on the United Nations system of administration of justice (see A/61/205 and Corr.1) and negotiations with staff through the Staff-Management Coordination Committee. The new system, which is meant to be in place by 1 January 2009, covers the global Secretariat and the separately administered United Nations funds and programmes.

2. The Secretary-General presented a report to the General Assembly at the second part of its resumed sixty-second session (A/62/782), which included the proposed statutes of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal and the Secretary-General's proposals for transitional measures to ensure the smooth transfer of cases from the current to the new system. This report was reviewed by the Advisory Committee on Administrative and Budgetary Questions (see A/62/7/Add.39) but has not yet been considered by the General Assembly.

3. The present report provides a brief update on the activities of the Secretariat to prepare for the new system and responds to the General Assembly's requests for additional information.

B. Preparations for the new system of administration of justice

General

4. In the first half of 2008, the relevant departments of the Secretariat and the separately administered United Nations funds and programmes have worked together closely to prepare for the new system. Detailed job descriptions for the new positions approved by the General Assembly have been finalized, classified and prepared for posting in the Galaxy system. The positions for the Office of Administration of Justice have already been advertised, and the selection process is under way. In addition, progress has been made in the elaboration of a code of conduct to ensure the independence and impartiality of individuals providing legal assistance to staff.

5. However, the fact that the statutes of the Dispute and Appeals Tribunals have not yet been adopted has hampered progress in some areas, for example, in the drafting of revised Staff Rules and administrative instructions, the preparations of detailed training materials and the drafting of terms of reference for the Registries of the Tribunals.

Internal Justice Council

6. The Internal Justice Council was established in May 2008, after the four initial members had selected the fifth member, who would serve as Chair. The members of the Internal Justice Council are:

Kate **O'Regan** (South Africa), Chair

Geoffrey **Robertson** (United Kingdom of Great Britain and Northern Ireland), external jurist nominated by staff

Sinha **Basnayake** (Sri Lanka), external jurist nominated by management

Jenny **Clift** (Australia), staff member nominated by staff

Maria **Vicien-Milburn** (Argentina), staff member nominated by management

7. The first task of the Internal Justice Council has been to work with the Secretariat to solicit candidates for the judicial positions in the Dispute and Appeals Tribunals. As prescribed in resolution 62/228, the Council has liaised with the Office of Human Resources Management on issues related to the search for suitable candidates. A vacancy announcement for the positions of judge was widely circulated. Among other steps, it was published in major media, sent to Member States, posted on the United Nations website, and sent to all United Nations country teams and information centres for further local circulation.

8. The Internal Justice Council will present a report to the General Assembly with its views and recommendations on two or three candidates for each vacancy in the Dispute and Appeals Tribunals.

Addressing the backlog

9. The Joint Appeals Boards, the Joint Disciplinary Committees, the Panel of Counsel, the Administrative Law Unit in the Office of Human Resources Management and the Administrative Tribunal have been working hard to address the backlog of cases. The additional resources provided by the General Assembly in this regard have been essential. Still, progress has been tempered by the exceptionally large number of new cases that have been filed the first half of the year. For example, the number of disciplinary cases received at Headquarters in the first four months of 2008, many from peacekeeping missions, was greater than the combined total received in 2006 and 2007. Disciplinary cases are generally more time-consuming and labour intensive.

10. The Administrative Tribunal held an extra session in April and May 2008 and disposed of 15 cases. Still, with many new cases being filed, it is expected that there will be a backlog exceeding 130 cases at the end of 2008.

II. Delegation of authority for disciplinary matters

A. Background

11. The Redesign Panel recommended delegating authority to heads of missions and offices away from Headquarters to handle disciplinary cases and to impose the full range of disciplinary measures. The idea was to help address the protracted

delays prevalent in the current centralized system, ensuring that cases were dealt with expeditiously and efficiently.

12. The Secretary-General proposed limited delegation of authority for disciplinary matters (A/62/294, paras. 96-124). His proposal was based on the Redesign Panel's recommendations and also look into account the recommendations made by the Staff-Management Coordination Committee at its twenty-eighth session, held in Nicosia from 25 June to 4 July 2007.

13. In paragraph 49 of its resolution 62/228, the General Assembly decided to endorse, in principle, the delegation of authority for disciplinary measures to heads of offices away from Headquarters and heads of missions/Special Representatives of the Secretary-General and requested the Secretary-General to present a detailed proposal regarding possible options for delegation of authority for disciplinary measures, including full delegation, as well as an assessment of possible implications for due process rights of staff members.

14. The following paragraphs contain a detailed description of the possible options reviewed by the Secretariat to ensure a fair, transparent and efficient disciplinary process for all individuals who have access to the current system of administration of justice and who shall have access to the new system (resolution 62/228, para. 7). Special attention has been given to the need to ensure that the large numbers of individuals in peacekeeping operations will have full and equal access to the new system of administration of justice and that adequate infrastructures are in place before any delegation of authority is implemented.

B. Full or limited delegation of authority

1. Full delegation of authority

15. Under the current system, the disciplinary process is centralized within the Office of Human Resources Management of the Department of Management at Headquarters or in the corresponding departments or offices in the separately administered United Nations funds and programmes that have delegated authority for disciplinary matters. The Redesign Panel noted that unless a robust system of justice was established in the field, at both the formal and informal levels, with staff members having access to legal representation, reform would be of limited impact. The Redesign Panel recommended that full delegation of authority be granted to special representatives of the Secretary-General heading peacekeeping and political missions and to heads of offices away from Headquarters in misconduct and disciplinary cases.

16. The option of full delegation of disciplinary authority to heads of both mission and offices away from Headquarters may have the advantage of eliminating some of the current delays linked to the centralized referral of cases to Headquarters and to the limited capacity of the Office of Human Resources Management to handle expeditiously a very large number of cases. However, delegating the full range of disciplinary authority to heads of missions and offices away from Headquarters poses a risk that measures that have a significant impact on the careers and professional reputations of individual staff members might be applied inconsistently among different duty stations. Unless a robust system is in place in the field, not only would such inconsistency have a negative impact on the due process rights of

staff, but it is also likely that it would lead to an increased number of contested decisions taken at the field level which would require management evaluations.

17. In order to properly implement a full delegation of authority for disciplinary matters to peacekeeping and special political missions as well as offices away from Headquarters, all the formal and informal components of the new administration of justice system would need to be decentralized. This would ensure full, transparent and equal access by individuals in the field. While such a decentralization could be cost-effective in large peacekeeping missions, it is unlikely that this would be the case for smaller missions or offices away from Headquarters.

18. In addition, full delegation of authority would require time and a major organizational effort to set up the necessary structures and complete the intensive training that would be required for the large number of officials who would be involved. This not only would be more costly but could also delay the implementation of this critical element of the new system.

2. Limited delegation of authority

19. In view of the above considerations, the Secretary-General proposes to delegate authority only partially, with the authority limited to imposing minor sanctions — censures and/or fines of an appropriate level. In addition, the authority to make other decisions during disciplinary proceedings would also be delegated to heads of mission and offices away from Headquarters in cases where the prerequisite conditions are in place, as described below. Although the authority to impose more severe disciplinary measures under chapter X of the Staff Rules would remain with the Under-Secretary-General for Management, limited delegation of authority would still help address the weaknesses highlighted by the Redesign Panel, in particular reducing the time required for the disciplinary process in the field.

20. As noted in paragraph 112 of A/62/294, due to the highly decentralized nature of the separately administered United Nations funds and programmes and their structures in field offices, which may create difficulties in achieving consistency, the disciplinary process and the authority to impose disciplinary measures will remain centralized in the separately administered United Nations funds and programmes.

C. Prerequisites for limited delegation of authority for disciplinary matters

21. It should be noted at the outset that, while the delegation of authority for disciplinary matters to heads of mission and offices away from Headquarters is part of the overall reform of the administration of justice, in order for it to be effective, other critical components must be in place prior to its implementation. These include access to the Office of the Ombudsman at Headquarters or at the regional level, access to a fully operational Office of Staff Legal Assistance in the field and in offices away from Headquarters, as well as the outposting of legal officers from the Department of Management to assist and advise the head of mission or head of office away from Headquarters. Therefore, the limited delegation of authority would be implemented only at those duty stations where those conditions exist, including at the regional level, as relevant.

22. In addition, training for all staff involved at all the different stages of the disciplinary process, including staff of the Office of Staff Legal Assistance, will be crucial. A comprehensive training programme should be carefully tailored to meet all needs and ensure that decisions taken by heads of mission or offices away from Headquarters are in conformity with the relevant regulations and rules and that the due process rights of staff are upheld. In designing a training programme, and information campaigns, management will consult with staff representatives.

23. In terms of training with respect to the investigation process, OIOS is currently designing an investigation learning programme aimed at equipping programme managers with basic investigations training for handling category II cases. The full complement of investigation learning programme modules will be developed by the end of 2008 or early 2009. The curriculum under development is based on best practices across the system, prevailing jurisprudence and relevant administrative issuances. In the development of the modules, due consideration is being given to the obligations of staff in terms of accountability as well as the protection of due process rights of staff in the conduct of an investigation.

24. A further prerequisite for the delegation of authority is the completion of a comprehensive review of the recommendations for disciplinary action made by heads of mission to Headquarters under the current system (see A/62/294, para. 120). This exercise, which is currently ongoing and is expected to be completed prior to the introduction of the new system, will form the basis for developing guidelines for the imposition of fines of and/or censures. Clear and comprehensive guidelines for programme managers will be essential to ensure a consistent application throughout the system of censures and fines of an appropriate level.

25. In addition, a revised administrative instruction relating to the disciplinary process must be issued to include procedures on the new mechanisms, including the reporting of misconduct, investigations, due process rights of staff, evaluation of investigation reports and disciplinary proceedings. All the prerequisites, including all required human resources, administrative instructions, guidelines and training as well as the relevant manuals and standard operating procedures mentioned in the paragraphs above, must be in place prior to the introduction of any limited delegation of authority for disciplinary measures. Much work still needs to be done in respect of those matters and, as agreed by the Staff-Management Coordination Committee at its twenty-eighth session, consultations with staff will be undertaken through the Committee's contact group on administration of justice.

D. Disciplinary proceedings

26. The limited delegation of authority to impose minor sanctions would be within the framework for disciplinary proceedings, as described below.

27. Chapter X of the Staff Rules, and in the case of the Secretariat, the related administrative instruction of 2 August 1991 (ST/AI/371), set out the existing disciplinary procedures. However, the administrative instruction predates the creation of both OIOS and the Department of Safety and Security. The Redesign Panel stressed the need for a clear investigation framework as part of the new system. Changes to reflect the new system of administration of justice, including the revised disciplinary process, are being made to chapters X and XI of the Staff Rules,

which govern the disciplinary and appeals processes. A new administrative instruction replacing ST/AI/371 will also be issued to provide details on the implementation of the new disciplinary process. The final amendments to the Staff Rules and the issuance of the new administrative instruction will be subject to the approval by the General Assembly of the statutes of the Dispute and Appeals Tribunals.

28. The components of the disciplinary process are described below according to the three successive phases: (a) the pre-disciplinary phase; (b) the disciplinary phase (and the proposed limited delegation of authority); and (c) the recourse mechanism.

1. Pre-disciplinary phase

Receipt of allegations or complaints

29. As a first step, reports of possible misconduct would be made by individuals to OIOS or a head of department or office. There is an obligation on the part of all United Nations staff to report possible misconduct that might come to their attention, and staff have been informed of this obligation (see ST/IC/2005/19 and ST/SGB/2005/21, sect. 1.1). Once the matter has been brought to the attention of OIOS or a head of department or office, a determination is made as to whether there are sufficient grounds on which to launch an investigation. While peacekeeping operations currently do so as a matter of course through conduct and discipline units, paragraph 12 of resolution 59/287 envisages a mechanism whereby programme managers will have the duty to report to OIOS all allegations of misconduct that come to their attention. The new administrative instruction on the disciplinary process will describe the various sources and mechanisms for reporting allegations of wrongdoing, defining the responsible officials and/or offices and containing the criteria for assessing whether a full-fledged investigation is warranted.

Conduct of investigations

30. As recognized by the Redesign Panel in paragraph 162 of its report (A/61/205), there is a need for a clear framework of cooperation and coordination between OIOS and the United Nations internal justice system bearing in mind the operational independence of OIOS. The relevant departments have been requested, therefore, to collaborate in developing an integrated system of common processes and unified rules of procedure. OIOS is updating its Investigations Manual, as well as standard operating procedures that specifically address technical and procedural matters related to investigations.

31. Since a large number of investigations (specifically, simple investigations or those involving lower risk to the Organization) are not conducted by OIOS, there is also a need for increased investigative capacity within the Department of Safety and Security and for programme managers throughout the Secretariat. As part of the development of an integrated system of investigative processes, standard operating procedures will also be developed by the Office of Human Resources Management for investigations and fact-finding, which are conducted under the authority of programme managers, and specialized training will be provided for all those entrusted with carrying out such investigations.

32. It should be noted that the Boards of Inquiry currently constituted in peacekeeping missions do not have the mandate to conduct disciplinary investigations in respect of United Nations staff members. The Boards are used mostly to establish facts pertaining to damage to or loss of United Nations property, or injury to United Nations personnel or third parties. The normal caseload would not justify establishing a standing Board of Inquiry in each peacekeeping mission, as had been recommended by the Redesign Panel. Instead, the Secretary-General proposes that each peacekeeping mission designate a staff member to preside over the Boards of Inquiry on a standing, full-time basis, but that the other members be assigned only on an as-needed basis.

33. The conduct and discipline units established in peacekeeping missions at an operational level receive allegations, but do not have investigative responsibilities. Cooperative working arrangements are in place between OIOS and the conduct and discipline units to ensure the proper categorization of allegations and effective investigative processes, which are under continuous review in order to identify efficiencies and ways to accelerate investigations.

Administrative leave

34. There are instances when it would be advisable for a staff member not to continue performing his or her functions on United Nations premises for a limited period of time in order to allow for the completion of an investigation or the finalization of disciplinary proceedings. In connection with the introduction of this type of administrative leave, which will be included in the revised chapter X of the Staff Rules, it is envisaged that authority to decide on whether to place a staff member on administrative leave during an investigation for up to a maximum of 15 calendar days would be delegated to heads of offices away from Headquarters and heads of mission. Any extension of the 15-day period would be subject, however, to approval by the Assistant Secretary-General for Human Resources Management.

Evaluation of the investigation

35. Once the investigation is completed, the final stage of the pre-disciplinary phase would be an evaluation of the investigation report and accompanying evidence to determine whether to initiate disciplinary proceedings against the staff member. Where an investigation has been undertaken by a programme manager, the results would be reported to OIOS in accordance with paragraph 11 of resolution 59/287. The Redesign Panel proposed the establishment of standing panels on disciplinary matters in all peacekeeping operations and offices away from Headquarters, to act as advisory bodies to review and recommend disciplinary action. As indicated by the Secretary-General in his report dated 23 August 2007 (A/62/294, para. 117), standing panels would most likely give rise to the same problems as those experienced with the existing Joint Disciplinary Committees (for example, the unavailability of volunteers), and they would also run contrary to the recommendation of the Redesign Panel that the current peer review system be abolished. Instead, the preferred option would be to have legal officers outposted from the Department of Management to selected missions and offices away from Headquarters where the workload justifies it or, in locations where the caseload does not justify a full-time legal officer, the functions could be performed at the regional level.

36. With the advice of the legal officer outposted from the Department of Management, the head of mission or head of office away from Headquarters would review the investigation report to ensure that both it and the supporting evidence were complete and that the charges had been properly formulated.

37. Before advising the head of mission or office away from Headquarters as to whether disciplinary proceedings should be initiated, the legal officer must consult the legal counsel for the staff member to clarify any outstanding issues.

2. Disciplinary phase

38. Disciplinary proceedings begin once a decision has been taken by the head of mission or office away from Headquarters to charge a staff member with misconduct following the review of the investigation report. The staff member would be informed in writing of the charges and provided with a copy of the evidence upon which the charges are based and the investigation report. In addition, he or she would be informed of his or her due process rights, which include the right to counsel and the right to respond to the charges.

39. As previously stated, the delegation of authority for disciplinary matters would be limited to the imposition of minor sanctions, censures and/or fines of an appropriate level, and such delegation would be implemented only at duty stations where the necessary capacity is in place. The authority to impose more severe sanctions would therefore remain with the Under-Secretary-General for Management.

3. Recourse mechanism

40. Should a staff member decide to contest the imposition of a disciplinary measure by the head of mission or office away from Headquarters, such a decision would be subject to a management evaluation conducted by the Department of Management. It could further be challenged before the Dispute Tribunal and, where the relevant grounds apply, appealed before the Appeals Tribunal.

E. Proposed safeguards

41. The steps noted in paragraphs 36 to 39 above following receipt of the investigation report constitute safeguards to ensure that the due process rights of staff members are respected. The measures comprise a review by the head of mission or office away from Headquarters, with the advice of the legal officer outposted from the Department of Management, to ensure that the investigation is complete and sufficient to proceed, that the charges are properly formulated, that the related report and evidence have been sent to the staff member with a request for comments, and that subsequently the staff member's comments are thoroughly assessed.

42. Additional safeguards were agreed by the Staff-Management Coordination Committee at its twenty-eighth session, whereby after the start of the disciplinary proceedings and after the staff member has commented, the legal officer outposted from the Department of Management must consult with the legal counsel of the staff member before any recommendation for disciplinary action is made to the head of mission or office away from Headquarters. Further, should the staff member contest

the imposition of a disciplinary measure by the head of mission or office away from Headquarters, such a decision would be subject to a management evaluation conducted by the Department of Management.

43. A further safeguard is the provision of legal assistance to the staff member, which was formalized in the establishment, pursuant to resolution 62/228, of the Office of Staff Legal Assistance to succeed the Panel of Counsel. The resolution approved posts for legal officers in New York, Addis Ababa, Beirut, Geneva and Nairobi, but not for the offices at Vienna, Bangkok and Santiago or in field missions.

44. Finally, decisions on the imposition of a disciplinary measure may be challenged before the Dispute Tribunal and may be appealed before the Appeals Tribunal.

F. Implementation of limited delegation of authority

45. The limited delegation of authority for disciplinary measures to the heads of mission or offices away from Headquarters would be granted only to those offices or missions where all the prerequisites and safeguards set out above are fully in place and the necessary resources are available to carry out those additional responsibilities.

46. It is therefore proposed that the limited delegation of authority for disciplinary measures be implemented in a phased manner, beginning with a select number of peacekeeping missions. Such delegation would serve to improve the implementation of the new system of administration of justice, as it would enable a more effective handling of the high volume of cases from those peacekeeping missions and would have a positive impact on the overall effectiveness of the mission.

47. In the first phase, limited delegation of authority would be established in the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), the United Nations Mission in the Sudan (UNMIS), and would also cover the African Union-United Nations Hybrid Operation in Darfur (UNAMID), and the United Nations Mission in Liberia (UNMIL), the United Nations Operation in Côte d'Ivoire (UNOCI) and the United Nations Integrated Peacebuilding Office in Sierra Leone (UNIPSIL). The positions required to handle the delegation would be accommodated within the commitment authority for the support account for peacekeeping operations for the period from 1 January to 30 June 2009, and subsequently included in the proposed 2009-2010 support account budget.

48. Anticipating that limited delegation of authority for disciplinary matters would proceed at the peacekeeping missions mentioned above, the training programmes described in paragraph 22 and information campaigns would need to be put in place for those duty stations as a matter of priority before the implementation of the new system, which is expected to take place in January 2009. Special consultations between management and the relevant staff representatives will be held as soon as practicable so as to secure timely and effective implementation of the new system.

49. The implementation of this first phase of the limited delegation of authority in MONUC, UNMIS, UNAMID, UNMIL, UNOCI and UNIPSIL would be examined in the context of the review of the system of administration of justice recommended

by the Staff-Management Coordination Committee at its twenty-eighth session, to be undertaken at the end of 2010.

III. Staff-funded scheme for legal assistance

50. In its resolution 62/228, the General Assembly requested the Secretary-General to report on progress in establishing a staff-funded scheme for legal assistance to staff, the idea being that such a scheme would allow staff members to secure external legal counsel to assist them in claims before the Dispute and Appeals Tribunals.

51. There are several challenges in establishing such a fund under conditions that would be financially viable, managerially solid and fair to all staff, regardless of duty station.

52. Perhaps the most significant reason why there has been no progress in establishing a staff-funded scheme is that the idea lacks support among the staff. At the recently concluded twenty-ninth session of the Staff-Management Coordination Committee, staff representatives expressed their concerns and doubts regarding the appropriateness and viability of such an approach. Staff stated that by joining the United Nations system, they were losing their rights to pursue labour-related disputes according to their national legislation. In many national jurisdictions, those rights also include access to legal representation. Therefore, staff reiterated their opinion that within the new system of internal justice, legal representation should be provided for and funded by the Organization.

53. The alternative of a general levy imposed on all staff to secure funding is not a realistic option. Even if one were to assume that stable funding could be achieved in some manner, there would need to be administrative structures in place for a fair and transparent process for deciding on the allocation of funds, and a mechanism for administering the programme that would ensure accountability and provide for regular audits. A recourse mechanism for staff members who may have claims relating to the administration of the programme or use of the funds would also be necessary.

54. As staff unions/associations are voluntary bodies, with only a few persons working on a full-time basis, having adequate human resources to administer the programme could be problematic. Staff unions/associations would need to agree on a single set of rules and procedures for allocating the monies equitably and rationally among the applicants. This would require a degree of cohesion among the unions/associations of the United Nations that does not currently exist.

55. Staff unions have expressed their will to enhance the ongoing support for staff volunteering professional legal counselling and to cooperate with the Secretary-General to develop incentives to enable and encourage staff to continue to participate in the work of the Office of Staff Legal Assistance, as requested in resolution 62/228.

IV. Information and communications technology

56. In its resolution 62/228, the General Assembly requested the Secretary-General to report on how information and communications technology (ICT) can improve the functioning of the system of administration of justice.

57. Among the hallmarks of the new system is that it be transparent and expeditious, and ICT can play a key role in achieving this. A detailed ICT plan will be elaborated once the new Office of Administration of Justice is operational and should take into account the need for systems that are compatible across the global Secretariat and the funds and programmes. However, outline of some main pillars of what should be implemented can already be provided.

58. In terms of the formal system, it is envisaged that the use of technology would be enhanced on two levels: access to information via the Internet; and electronic filing (e-filing) of submissions. This has the advantage of introducing the changes to parties, staff and judges along with the new system and would be in line with the increasing use of technology throughout the United Nations, and would represent worthwhile and cost-effective innovations.

A. Website

59. An Administration of Justice system website containing all relevant information about the Office and the justice system is essential. The site may be hosted on the Internet in a secure manner, since not all persons under the jurisdiction of the Tribunals will enjoy Intranet access. Moreover, web-hosting will permit the Dispute and Appeals Tribunals judges away from duty stations, interested persons and academics access to the most recent developments in administration of justice.

60. Links to related offices, such as the Office of the Ombudsman, the Office of Staff Legal Assistance and the Office of Human Resources Management, as well as relevant offices in the funds and programmes, should be provided. From the main portal, there should be links to the websites of the Dispute and Appeals Tribunals. The sites should include all relevant contact information, information on filing submissions (see below for e-filing proposals); frequently asked questions written in plain, easily accessible language; and, as applicable, the respective Statutes and Rules; and fully searchable jurisprudence.

61. In addition, it is proposed that each website contain a secure area, which would permit any party in an active case, as well as the relevant unit or registry, to log in and review the status of a case, all submissions filed and related correspondence.

B. E-filing

62. At the current Administrative Tribunal, parties are required to file one original and seven copies of their submission. The submissions are frequently bulky and incur production and transmission expense for applicants who do not have access to United Nations facilities. A significant proportion of submissions are rejected on the grounds of formatting, which incurs expense for the Organization in the return of

submissions and for the applicants in reformatting and resubmitting, as well as delaying the case. Upon the receipt at the Administrative Tribunal of a submission that meets the procedural requirements, one copy is transmitted to the other party. The remaining copies are initially kept at the tribunal secretariat for use by legal officers and members of the Tribunal. Once a judgement has been rendered, one set of the documents is sent for translation and another is sent to archives. The remaining documents are disposed of. Document storage is a perennial concern.

63. In the new system, e-filing could be introduced, whereby parties file electronic submissions, preferably via a secure portal on the website of the Management Evaluation Unit, the Dispute and Appeals Tribunals and relevant offices of the funds and programmes. A PDF format, or similar, would provide a valuable template and reduce errors and omissions. As submissions are invariably computer generated in the current system, the cost and inconvenience to the parties would be limited to the scanning of annexes to their submissions, some of which may already exist electronically. All current employees of the Organization should be permitted to use a United Nations scanner for that purpose; those who lack such access should be able to request the Office of Staff Legal Assistance for assistance. In the rare circumstance that scanning proves impossible for a party, the relevant administration of justice unit or registry would accept and scan documents.

64. E-filing would also permit the operation of an "e-Court" environment, permitting access by all parties in a tribunal hearing to documents in electronic format. This would permit hearings (or special deliberations of judges in remote locations) to be carried out on a paper-free model, as has been implemented with great success at the International Tribunal for the Former Yugoslavia. Submissions and evidence are efficiently organized, searched, shared, distributed and annotated, and may be accessed from anywhere in the world. The advantages of the proposed e-filing system include:

- transparency for all parties and personnel
- confidence in the receipt of submissions (which currently engenders significant correspondence)
- automatic e-mail notification of case activity
- immediate access to documents
- ability to store and search documents electronically
- ability to correct or update submissions, as necessary
- ease and speed of transmission between offices
- efficient transmission to the translation services
- convenience for judges and personnel working in remote locations
- significant reduction in costs of production and reproduction of submissions
- significant reduction in storage space required
- environmental benefits.

65. For practical purposes, it is proposed that the e-filing system be introduced only in English and French, as the overwhelming majority of cases are filed in those languages. Submissions in other official languages could be e-mailed to the

respective registry and the translated document posted online. Upon review of the system, once operational, the modifications required to adapt it for all official languages could be studied and a cost-benefit analysis produced.

66. Finally, with respect to communications technology, it is proposed that the judges of the Dispute and Appeals Tribunals be encouraged to utilize such methods to enhance their working practices wherever possible and to explore the use of such technology in conducting oral hearings and other inquiries.

67. While the above outlines some of the expected benefits, it is unlikely that they will be in place at the time the new system is to be introduced in January 2009. A detailed project plan will need to be developed, in consultation with all stakeholders, including choosing solutions for hosting the application and selecting the software, and identifying the resources required.

V. Other information requested by the General Assembly

A. Registries

68. The General Assembly, in its resolution 62/228, requested the Secretary-General to provide terms of reference for the Registries, taking into account the current working methods of the United Nations Administrative Tribunal.

69. The Secretariat will prepare the terms of reference of the Registries once the statutes of the Dispute and Appeals Tribunals have been approved by the General Assembly. Accordingly, it is proposed that the terms of reference of the Registries be submitted to the General Assembly at its resumed sixty-third session.

B. Cost-sharing

70. The General Assembly, in resolution 62/228, requested the Secretary-General to report to it at the main part of its sixty-third session on:

(a) The results of the negotiations between the United Nations and other participating entities on cost-sharing arrangements for the system of administration of justice (para. 67 (b));

(b) Viable options for programme support cost/trust funds to share the cost of the new internal justice system (para. 67 (d)).

71. The Secretariat initiated consultations with the participating, separately administered United Nations funds and programmes following the adoption of resolution 62/228, and those discussions are still ongoing. The funds and programmes have raised concerns regarding both the basis for the cost-sharing arrangement and certain operational aspects of the system itself. With regard to the basis for the cost-sharing, the funds and programmes have suggested that it be founded on actual cases disposed of as opposed to headcount. It is recalled that the General Assembly, in its resolution 62/228, approved the cost-sharing arrangement proposed by the Secretary-General in his report (A/62/294, paras. 161 and 162), which was based on the total number of staff members in the Secretariat and in the funds and programmes. Examples of operational aspects that require further negotiations include agreement on the details of cost-sharing of the integrated

Office of the Ombudsman, agreement on treatment and cost-sharing of the existing backlog of cases, agreement that all newly created information technology systems have to be compatible with the enterprise resource planning systems of the funds and programmes. Viable options for programme support cost/trust funds to share the cost of the new internal justice system are also being reviewed.

72. The Secretariat shall continue discussions with the funds and programmes with the aim of reaching agreeable solutions with all organizations and will report back to the General Assembly on the outcome of those discussions.

C. Mechanisms for the removal of judges

73. In paragraph 67 (c) of its resolution 62/228, the General Assembly requested the Secretary-General to provide information regarding mechanisms for the formal removal of judges, definition of the grounds of misconduct or incapacity and the means for the establishment of such grounds in a specific case.

74. At present, neither the Statute nor the Rules of the Administrative Tribunal set out procedures for removal of the members of the Tribunal. The statute provides, in article 3 (5), that no member of the Tribunal can be dismissed by the General Assembly unless the other members are of the unanimous opinion that he or she is unsuited for further service. Based on available information, this article has not been implemented to date.

75. The Redesign Panel recommended in its report that judges of the Dispute and Appeals Tribunals should be removable only by the General Assembly, at the request of the Secretary-General, and only on grounds of proven misconduct or incapacity (A/61/205, para. 130). The Secretary-General indicated his support for that proposal (A/62/294, para. 70).

76. In its decision 62/519, the General Assembly took note of the conclusions of the Sixth Committee regarding the removal of judges. Specifically, the Sixth Committee stated that judges of the Dispute and Appeals Tribunals shall be removable only by the General Assembly and exclusively on grounds of misconduct or incapacity. This language is reflected in article 4 (10) of the statute of the Dispute Tribunal and in article 3 (10) of the statute of the Appeals Tribunal, which are currently under consideration by the Assembly.

77. While it was originally proposed by the Secretary-General that the removal of judges by the Assembly would be initiated at his request (A/62/294, para. 70), it was subsequently considered that such an approach might raise concerns about the perception of a conflict of interest, as the Tribunal judges are mandated to review challenges to administrative decisions made by the Secretary-General. It should be noted that in a number of administrative tribunals of international organizations, the members of the tribunals are involved in the removal process. As discussed above, the dismissal of a member of the United Nations Administrative Tribunal requires the unanimous opinion of the other Tribunal members that the individual is unsuited for further service. Likewise, the termination of a member of the Administrative Tribunal of the International Monetary Fund requires the opinion of the other members that such individual is unsuited for further service.[1] Similarly, a judge of

[1] Article VII (5) of the statute of the Administrative Tribunal of the International Monetary Fund.

the European Union Civil Service Tribunal may only be deprived of office if, in the unanimous opinion of the judges and advocates general of the Tribunal, he no longer fulfils the requisite conditions or meets the obligations arising from this office.[2]

78. In view of the practice of other administrative tribunals of international organizations, the Secretary-General proposes that where an allegation regarding the misconduct or incapacity of a judge arises, such allegation should be reported to the President of the Tribunal in question, that is either the Dispute Tribunal or the Appeals Tribunal. The President of the Tribunal would establish a panel consisting of specialists to investigate the allegations. The due process rights of the judge must be respected during the course of an investigation, for example, he or she must be given the opportunity to respond to the allegation and submit relevant evidence. The report of the panel would be reviewed by the entire Tribunal, with the exception of the judge under investigation, and if there is a unanimous opinion that the allegation of misconduct or incapacity is well founded, the President of the Tribunal would report the matter to the General Assembly and request the removal of the judge.

79. The types of misconduct warranting removal from the Dispute or Appeals Tribunal would include violations of the following rules: (a) the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission, as set out in ST/SGB/2002/9; and (b) the code of conduct for the judges, which is to be prepared by the Internal Justice Council and considered by the General Assembly in accordance with paragraph 37 (c) of resolution 62/228. The types of incapacity warranting removal from the Dispute or Appeals Tribunal would include either a physical or mental condition that would prevent a judge from performing his or her judicial functions and that cannot be addressed by a reasonable accommodation of such condition.

VI. Revisions to the Staff Regulations

80. The introduction of the new system of administration of justice will necessitate changes to articles X and XI of the Staff Regulations, and the corresponding chapters X and XI of the Staff Rules. The Secretary-General seeks the approval of the General Assembly of the following revised regulations 10.1 and 11.1, to come into effect simultaneously with the implementation of the new system of administration of justice on 1 January 2009:

Regulation 10.1

The Secretary-General may impose disciplinary measures on staff members who engage in misconduct. Sexual exploitation and sexual abuse constitute serious misconduct.

Regulation 11.1

There shall be a two-tier formal system of administration of justice:

(a) The United Nations Dispute Tribunal shall, under conditions prescribed in its statute, hear and render judgement on an application from a

[2] Article 7 of the statute of the Court of Justice of the European Communities, which is applicable to the European Union Civil Service Tribunal pursuant to article 5 of the Tribunal's statute.

staff member alleging non-compliance with his or her terms of appointment or conditions of employment, including all pertinent regulations and rules;

(b) The United Nations Appeals Tribunal shall, under conditions prescribed in its statute and rules, exercise appellate jurisdiction over an appeal of a judgement rendered by the United Nations Dispute Tribunal submitted by either party.

81. Revisions are being prepared to chapters X and XI of the 100, 200 and 300 series of the Staff Rules in consultation with all stakeholders. Should the General Assembly approve the above amendments to the Staff Regulations, the revised rules would be promulgated provisionally, effective 1 January 2009. The revised rules would be reported to the General Assembly at the first resumed part of its sixty-third session.

VII. Compensation for judges of the Dispute Tribunal and Appeals Tribunal

82. In his report of 23 August 2007, the Secretary-General stated that the judges of the Dispute Tribunal would be considered United Nations officials and that the non-staff compensation proposed would comprise salary and allowances equivalent to United Nations staff members at the Director level, and honorariums for judges of the Appeals Tribunal equivalent to rates applicable to the International Labour Organization (ILO) Administrative Tribunal, to provide for the services of judges rendering decisions on Appeals Tribunal cases. In its resolution 62/228, the General Assembly, in endorsing the recommendations of the Advisory Committee on Administrative and Budgetary Questions (A/62/7/Add.7), approved non-post resources in the amount of $785,600 for non-staff compensation for judges corresponding to the above.

83. It is therefore the intention of the Secretary-General to compensate the judges to be appointed by the Assembly to serve on the Dispute Tribunal with salaries and allowances equivalent to the D-2 level (see annex I). The salaries and allowances of part-time judges appointed to the Dispute Tribunal would be paid on the basis of the principles contained in the administrative instruction on part-time employment (ST/AI/291/Rev.1), as appropriate. The judges will have the status of officials other than Secretariat officials in order to maintain their independence vis-à-vis the Secretariat. It is also the intention of the Secretary-General to pay an honorarium to the judges on the Appeals Tribunal for each decision rendered, using rates equivalent to those applied to the judges of the ILO Administrative Tribunal: head judges would receive $2,400 per judgement, and participating judges would receive $600 per judgement.

VIII. Conclusions

84. The Secretary-General considers the introduction of the new system of administration of justice as an integral part of the overall management reform of the United Nations. It will contribute to a better managed Organization by having a system of dealing with internal employment-related disputes that is more professional, transparent and decentralized. It will be fairer to staff, and the checks

and balances will contribute to stronger accountability with regard to decision-making.

85. It is also an important step in unifying the systems between the Secretariat and the separately administered United Nations funds and programmes. Just as the elaboration of the proposals for the new system was a unique joint endeavour with the separately administered United Nations funds and programmes, with staff and with Member States, this common collaboration has continued to characterize the preparations that are under way for the introduction of the new system.

86. The Secretariat is poised to proceed with the introduction of the new system, as approved by the General Assembly in its resolution 62/228, with regard to all staff who have access to the current system of administration of justice. The Secretary-General therefore wishes to stress the importance of having the statutes of the Dispute and Appeals Tribunals adopted, the judges appointed and amendments to the Staff Regulations approved, and to have a decision by Member States on his proposal for transitional measures (see A/62/782) as soon as possible. So many other necessary actions depend on those decisions, and delays would put the mandated implementation date of 1 January 2009 in peril. If necessary, any decisions made now could be reviewed in future, in the light of experience gained in the implementation of the new system. What is critical now is to put the basic elements of a functioning system in place by 1 January 2009.

IX. Recommendations and actions to be taken by the General Assembly

87. **It is important for the implementation of the new system of administration of justice that additional personnel (financed from within existing resources) be outposted to MONUC, UNMIL and UNMIS so as to allow support to the heads of those missions in exercising limited delegation of authority for disciplinary matters.**

88. **The General Assembly may wish to:**

(a) **Take note of the proposal to grant limited delegation of authority for disciplinary measures in a phased manner, beginning with a select number of peacekeeping missions, in accordance with the considerations and prerequisites described in the present report;**

(b) **Approve the proposed conditions of service of the judges of the Dispute and Appeals Tribunals.**

Annex

Compensation for judges of the United Nations Dispute Tribunal

Further to paragraph 83 of the present report, the Secretary-General proposes that the judges of the United Nations Dispute Tribunal be compensated equivalent to staff members at the D-2 level. Compensation for part-time judges would be based on the principles contained in the administrative instruction on part-time employment (ST/AI/291/Rev.1). This would include:

Full-time judges	*Part-time judges*
• Salary and allowances equivalent to those payable to United Nations staff members at the D-2 level, step IV. Allowances would include:	• 50 per cent salary and allowances equivalent to those payable to United Nations staff members at the D-2 level, step IV, except as provided below. Allowances would include:
• a representation allowance of US$ 600 per annum	• a representation allowance of US$ 300 per annum
• assignment grant	• assignment grant at 50 per cent
• dependency allowance	• dependency allowance at 50 per cent
• entitlement to shipment of personal effects	• entitlement to shipment of personal effects as if full-time judge
• education grant and travel	• education grant and travel at 50 per cent
• rental subsidy	• rental subsidy at 50 per cent
• Compensatory and insurance arrangements equivalent to those of staff members at the D-2 level, including provision for:	• Compensatory and insurance arrangements equivalent to those of part-time staff members at the D-2 level, including provision for:
• Compensation under the terms of appendix D to the Staff Rules for service-attributable death, injury or illness	• Compensation on a 50 per cent basis under the terms of appendix D to the Staff Rules for service-attributable death, injury or illness
• Compensation for death or disability while in office, or in receipt of disability benefits, comparable to the benefits payable in respect of participants in the United Nations Joint Staff Pension Fund under provisions for disability benefit and secondary dependent's benefit of the Regulations of the Fund	• Compensation for death or disability while in office, or in receipt of disability benefits, comparable to the benefits payable in respect of part-time participants in the United Nations Joint Staff Pension Fund under provisions for disability benefit and secondary dependent's benefit of the Regulations of the Fund

Full-time judges	*Part-time judges*
• Participation in health insurance arrangements of the United Nations on the same basis as staff members at the D-2 level.	• Participation in health insurance arrangements of the United Nations on the same basis as part-time staff members at the D-2 level
• Same standard of accommodation for all travel on official business (including appointment, home leave and repatriation) as staff members of the United Nations at the D-2 level	• Same standard of accommodation for all travel on official business (including appointment, home leave and repatriation) as staff members of the United Nations at the D-2 level
• Participation in the Pension Fund under supplementary article B of the Regulations of the Fund; the pensionable remuneration level and rates of contribution would be set at those levels applicable to staff members of the United Nations at the D-2 level	• Participation in the Pension Fund under supplementary articles A and B of the regulations of the fund; the pensionable remuneration level and rates of contribution would be set at those levels applicable to part-time staff members of the United Nations at the D-2 level
• Same annual leave as staff members of the United Nations holding fixed-term appointments of the same duration (2.5 days per month of service)	• Same annual leave as part-time staff members of the United Nations holding fixed-term appointments of the same duration (part-time judges will accrue annual leave at the rate of 1.25 full days per month of service)
• Same sick leave as staff members of the United Nations holding fixed-term appointments of the same duration	• Same sick leave as part-time staff members of the United Nations holding fixed-term appointments of the same duration (part-time judges will receive during sick leave one half of the salaries and allowances that would be payable to full-time judges)
• Same home leave as staff members of the United Nations holding fixed-term appointments of the same duration	• Same home leave as part-time staff members of the United Nations holding fixed-term appointments of the same duration (travel and related entitlements with the same periodicity as full-time judges and shall be paid one half of the expenses which would have been paid to full-time judges)

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United Nations Relief and Works Agency for Palestine Refugees in the Near East

Persons displaced as a result of the June 1967 and subsequent hostilities

Report of the Secretary-General

Summary

In its resolution 62/103, the General Assembly requested the Secretary-General to report to it, after consulting with the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), on the progress made in the implementation of the resolution.

The present report refers to correspondence between the Secretary-General and the Permanent Representative of Israel to the United Nations regarding actions taken by the Government of Israel in implementing the relevant provisions of the resolution. It also presents the information made available by the Commissioner-General of UNRWA to the Secretary-General on the return of refugees registered with the Agency to the West Bank and the Gaza Strip from Jordan, Lebanon and the Syrian Arab Republic.

* A/63/150.

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1. The present report is submitted to the General Assembly pursuant to paragraph 5 of its resolution 62/103, entitled "Persons displaced as a result of the June 1967 and subsequent hostilities", the operative part of which reads:

> *The General Assembly*,
>
> ...
>
> 1. *Reaffirms* the right of all persons displaced as a result of the June 1967 and subsequent hostilities to return to their homes or former places of residence in the territories occupied by Israel since 1967;
>
> 2. *Expresses deep concern* that the mechanism agreed upon by the parties in article XII of the Declaration of Principles on Interim Self-Government Arrangements of 13 September 1993 on the return of displaced persons has not been complied with, and stresses the necessity for an accelerated return of displaced persons;
>
> 3. *Endorses*, in the meanwhile, the efforts of the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East to continue to provide humanitarian assistance, as far as practicable, on an emergency basis, and as a temporary measure, to persons in the area who are currently displaced and in serious need of continued assistance as a result of the June 1967 and subsequent hostilities;
>
> 4. *Strongly appeals* to all Governments and to organizations and individuals to contribute generously to the Agency and to the other intergovernmental and non-governmental organizations concerned for the above-mentioned purposes;
>
> 5. *Requests* the Secretary-General, after consulting with the Commissioner-General, to report to the General Assembly before its sixty-third session on the progress made with regard to the implementation of the present resolution.

2. On 28 April 2008, the Secretary-General addressed notes verbales to the Permanent Representatives of Member States, including the Permanent Representative of Israel to the United Nations, in which he drew attention to his reporting responsibility under the resolution and requested the Permanent Representative to inform him of any action his Government had taken or envisaged taking in implementation of the relevant provisions of the resolution.

3. In a note verbale dated 7 August 2008, the Permanent Representative of Israel replied as follows:

> The Permanent Mission of the Israel to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to refer to the latter's note, dated 28 April 2008, concerning resolutions 62/102 to 62/105 adopted by the General Assembly under agenda item "United Nations Relief and Works Agency for Palestine Refugees in the Near East".
>
> As the summary records note, Israel has voted against these resolutions. Israel supports the humanitarian mission of UNRWA and recognizes its important contribution to the welfare of the Palestinians. Israel, however, remains concerned with the political motivation of the aforesaid resolutions, as well as their content which fail to reflect reality on the ground.

A number of important developments on the ground have created an environment for progress, which the resolutions, regrettably, wilfully ignore. Israel, furthermore, remains committed to the bilateral process with the Palestinian Authority. Weekly meetings take place between Israeli and Palestinian leaders to support a political horizon and maintain dialogue for negotiations.

Moreover, despite terrorist attacks on the very crossing points that enable the entry of humanitarian aid into the Gaza Strip, Israel has made major efforts to ensure the steady and continuous flow of fuel and other supplies into the Gaza Strip to meet the needs of the civilian population. Since June 2007, more than 600,000 tons were transferred through the crossings. Israel continues its coordination activities on the ground, working through the appropriate channels, including UNRWA staff, to ensure the passage of aid and other materials.

Israel is in favour of consolidating UNRWA resolutions and removing any extraneous political language. Israel looks forward to continuing its cooperation and working relationship with UNRWA. Accordingly, Israel urges the Secretary-General and UNRWA to consider, together with the concerned parties, ways in which the organization can enhance the fulfilment of UNRWA's mandate in an accountable and responsible manner in the best interests of those whom it has been charged to serve.

4. In connection with paragraph 2 of General Assembly resolution 62/103, the Secretary-General has obtained from the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) the information available to her on the return of refugees registered with the Agency. As indicated in previous reports on the subject, the Agency is not involved in any arrangements for the return of refugees, nor is it involved in any arrangements for the return of displaced persons who are not registered as refugees. Its information is based on requests by returning registered refugees for transfer of their UNRWA registration records from Jordan, Lebanon or the Syrian Arab Republic to the areas to which they have returned. The Agency would not necessarily be aware of the return of any registered refugees who did not request the transfer of their registration records. So far as is known to the Agency, from 1 July 2007 to 30 June 2008, 1,171 refugees registered with UNRWA returned to the West Bank and 389 to the Gaza Strip from places outside the occupied Palestinian territory. It should be noted that some of these may not have been displaced in 1967 but may have been displaced in earlier or later years or may be members of the family of a displaced registered refugee. Thus, taking into account the estimate given in paragraph 5 of the previous report (A/62/282), the number of displaced registered refugees who are known by the Agency to have returned to the occupied territories since June 1967 is about 30,563. The Agency is unable to estimate the total number of displaced inhabitants who have returned. It keeps records only of registered refugees and, as noted above, even those records, particularly with respect to the location of registered refugees, may be incomplete.

5. In connection with paragraph 3 of General Assembly resolution 62/103, the Secretary-General refers to the report of the Commissioner-General of UNRWA for the period from 1 January to 31 December 2007 (A/63/13) and to the previous reports of the Commissioner-General for accounts of the continuous and ongoing assistance provided by UNRWA to persons displaced and in need of continued assistance.